No. 92-1107

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In The

Supreme Court of the United States

October Term, 1992

STEWART ARTHUR HOLMES, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY GULF COAST MARINE CERTIFICATE NO. 11877, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER; RONALD MALCOLM PATEMAN, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO INSURANCE EVIDENCED BY COVER NOTE NO. DEL:50/85/1, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER; AND SEUMUS IAIN COWLEY, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY COVER NOTE NO. DEL:M822/85, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER,

Petitioners,

vs.

MR. AND MRS. ALBERT TAYLOR, JR.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit's holding that the laws of the several states determine the recoverability of maritime law punitive damages violates the principle of uniformity in maritime law established by prior decisions of this Court and the substantive jurisdiction reserved to federal courts under the U.S. Constitution.

2. Whether the Fifth Circuit's decision creates a conflict among the circuits.

3. Whether punitive damages may be recovered against an insurer as a matter of maritime public policy.[1]

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[1] The following are parties who have a real or potential interest in the outcome of this case:

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No. _____

In The

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STEWART ARTHUR HOLMES, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY GULF COAST MARINE CERTIFICATE NO. 11877, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER; RONALD MALCOLM PATEMAN, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO INSURANCE EVIDENCED BY COVER NOTE NO. DEL:50/85/1, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER; AND SEUMUS IAIN COWLEY, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY COVER NOTE NO. DEL:M822/85, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER,

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Stewart Arthur Holmes, for and on behalf of certain underwriters at Lloyd's, London, subscribing to insurance evidenced by Gulf Coast Marine Certificate No.

11877, each for his own and not one for the other; Ronald Malcolm Pateman, for and on behalf of certain underwriters at Lloyd's, London subscribing to Insurance evidenced by cover note No. DEL:50/85/1, each for his own and not one for the other; and Seumus Iain Cowley, for and on behalf of certain underwriters at Lloyd's, London, subscribing to insurance evidenced by cover note No. DEL:m822/85, each for his own and not one for the other, Petitioners, hereby petition the Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on September 24, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Taylor v. Lloyd's Underwriters of London*, 972 F.2d 666 (5th Cir. 1992).

The ruling of the district court is unreported. The case number in the Eastern District of Louisiana is 90-1403.

JURISDICTIONAL GROUNDS

The decision of the United States Court of Appeals for the Fifth Circuit was entered September 24, 1992. No application for rehearing was filed. A suggestion for rehearing en banc was filed which was denied on October 23, 1992. This Court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. 1254.

Jurisdiction in the Lower Courts

The District Court had jurisdiction over the case pursuant to 28 U.S.C. 1332 and 28 U.S.C. 1333. The Court of

Appeals had jurisdiction over the matter under 28 U.S.C. 1291.

CONSTITUTIONAL PROVISIONS

The relevant Constitutional Provisions are set forth in the Appendix. They are: U.S. Const. art. III, § 2 cl. 1, U.S. Const. art. VI, cl. 2.

STATEMENT OF THE CASE

On October 16, 1985, the DMC-1, a self-propelled liftboat bareboat chartered by Drynorth capsized while attempting to jack-up. Mr. Albert Taylor, an employee of Offshore Hammers, Inc., was a passenger aboard the DMC-1 when it capsized.

As a result of personal injuries allegedly sustained in the casualty Taylor and his wife (collectively "Taylor") sued Drynorth in 1986 in the United States District Court for the Western District of Louisiana, asserting claims solely under the general maritime law for both compensatory and punitive damages. The case was transferred to the Eastern District of Louisiana for a jury trial. At the conclusion of trial, a verdict was entered against Drynorth and in favor of Taylor, awarding compensatory damages in the amount of $751,780.00 and punitive damages in the amount of $500,000.00. A judgment reflecting this verdict was entered on September 7, 1989, and the compensatory damages portion was later satisfied by the defendant.

On March 19, 1990, Taylor filed a Complaint for Declaratory relief in state court seeking to enforce the judgment for punitive damages against the subscribers to three insurance policies issued to Drynorth. Taylor

claimed that these policies provided coverage for punitive damages and that the insurers under the three policies were consequently required to pay the punitive damages assessed against Drynorth. On April 18, 1990, the underwriters (now the petitioners herein) filed a petition for removal to the United States District Court for the Eastern District of Louisiana, Civil Action No. 90-1403.

On December 5, 1990, underwriters filed a motion for summary judgment on the basis that, inter alia, the limits of the relevant policies had been exhausted and that punitive damages were not recoverable against an insurer as a matter of maritime public policy. Similarly, Taylor filed a motion for partial summary judgment asking the court to recognize coverage for punitive damages under a $500,000 comprehensive general liability policy.

On February 27, 1991, the district court entered an order and reasons denying Taylor's motion and granting summary judgment in favor of underwriters. The court, applying federal maritime law, held that punitive damages were not insurable as a matter of law. As a result, the court *did not* address any of the important issues of coverage for punitive damages, including exhaustion of coverage or interpretation of the policies involved in the case. Rather, the Court considered all other issues raised in the cross-motions for summary judgment as moot. The order and reasons were made the subject of a Rule 58 judgment entered on July 12, 1991. On July 23, 1991 Taylor filed a notice of appeal in the Court of Appeals for the Fifth Circuit appealing the final judgment.

On September 24, 1992, a three judge panel of the Court of Appeals reversed the decision of the district court and remanded the case so that state law could be

applied. The Court of Appeals based this decision upon its interpretation of *Wilburn Boat Company v. Fireman's Fund Insurance Company*, 348 U.S. 310 (1955).

The Underwriters filed a suggestion for rehearing en banc on October 8, 1992. The Fifth Circuit denied the suggestion on October 23, 1992.

REASONS FOR GRANTING A WRIT

The Court should grant this writ application, not only to correct the erroneous Fifth Circuit decision as it applies to applicants but, more importantly, to prevent the profound negative impact the decision will have on the important issues of maritime law uniformity and federalism.

Specifically, the Fifth Circuit was asked to consider whether, as a matter of public policy, an award of punitive damages under the general maritime law could be recovered from the insurer of the party against whom the damages were assessed. The trial court concluded that, as a matter of law, it could not. In reversing the trial court's granting of summary judgment, the Fifth Circuit viewed the question as follows: 1) Is there well established dispositive maritime precedent on the issue? 2) If not, state law must apply. Finding no controlling precedent, the Fifth Circuit reversed and remanded, ordering the trial court to apply the law of the state with the greatest interest in the controversy.

This amazing abdication of its admiralty jurisdiction by a federal court was premised solely upon a misapplication of this Court's decision in *Wilburn Boat Company v. Fireman's Fund Insurance Company*, 348 U.S. 310 (1955). The Fifth Circuit has now read *Wilburn Boat* to mean that every issue which in any way involves marine insurance

– whether arising in tort or contract – must hereafter be decided by the disparate laws of the several states absent a well established federal maritime law precedent.

In reaching this result, the Fifth Circuit has thoroughly misunderstood the issue before it, and has diminished its ability to define the extent of substantive rights arising solely under the general maritime law in derogation of its own constitutionally mandated jurisdiction. Far from being a *Wilburn Boat* controversy, the issues before the Fifth Circuit and now this Court are: first, the ascertainment of the public policy which prompted the creation of a right to recover punitive damages under maritime law and second, determination of whether that policy allows for recoverability of punitive damages from an insurer. If, as applicants urge, the goal is deterrence, public policy will not be served by allowing a tort feasor to insure itself from a punitive damage award and this Court should so determine. However the Court chooses to resolve the issue, the scope of maritime law punitive damages is inherently an issue of maritime law. Federal courts have the constitutional authority and duty to determine the limitations of this federally created right. Ceding this authority to the several states represents a violation of the Admiralty Clause of the Constitution[2] – which confers exclusive jurisdiction of this issue upon the federal courts – and the Supremacy Clause[3] – which mandates that federal law must take precedence over state law where federal law applies.

Of equal concern to this Court is the effect the Fifth Circuit's ruling will have on the uniformity of maritime

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[2] U.S. Const. art. III, § 2 cl. 1

[3] U.S. Const. art. VI, cl. 2

law. Numerous times – from *The Lottawanna*[4] to *Miles v. Apex*[5] – this Court has reaffirmed the need for uniformity in maritime law. By its terms, the Fifth Circuit decision would potentially permit fifty different rules with respect to the recoverability of punitive damages. This horrible scenario would fragment both maritime insurance and commerce and allow the outcome of lawsuits applying general maritime law to be determined by the fortuity of the state next to which an ocean-going or river vessel is located at the time of collision or accident. If there exists any reason for uniformity in maritime law, it is to preclude such a result.

This Court should additionally grant certiorari to resolve a conflict in its own jurisprudence and among the Circuit courts created by the analysis employed in *Wilburn Boat Company v. Fireman's Fund Insurance Company*[6]. This repeatedly criticized opinion has cast doubt on the future vitality of marine insurance law in particular and maritime law in general for almost forty years. Now, with the Fifth Circuit's decision in *Taylor*, the faulty premise of *Wilburn Boat* – that if there exists no established precedent on an issue of decidedly substantive maritime jurisdiction, the Court may then apply state law – has borne a poisonous fruit which will, if unchecked, systematically destroy the uniformity of maritime tort law. This result is at odds with *Southern Pacific Co. v. Jensen*[7], *Chelentis v.*

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[4] 88 U.S. (21 Wall.) 558 (1875).

[5] 498 U.S. 19 (1990).

[6] 348 U.S. 310 (1955).

[7] 244 U.S. 205 (1917).

Luckenbach[8], *Garrett v. Moore-McCormick*[9], *Moragne v. States Marine Lines*[10], and numerous other decisions – all of which have emphasized the critical importance of uniformity in matters of substantive maritime law. A resolution of this long-standing conflict, now brought sharply into focus by the Fifth Circuit's decision, is imperative if this Court and the lower federal courts are to remain, in any substantive sense, Courts of Admiralty.

I. WHETHER THE FIFTH CIRCUIT'S HOLDING THAT STATE LAW MUST DETERMINE THE RECOVERABILITY OF MARITIME LAW PUNITIVE DAMAGES VIOLATES THE PRINCIPLE OF UNIFORMITY IN MARITIME LAW ESTABLISHED BY PRIOR DECISIONS OF THIS COURT AND THE SUBSTANTIVE JURISDICTION RESERVED TO FEDERAL COURTS UNDER THE U.S. CONSTITUTION.

a. Punitive Damages, and Consequently Their Recoverability From an Insurer, Arise Solely From Maritime Law

The right which enabled Taylor to recover punitive damages against Drynorth and which Taylor is now seeking to expand to include recovery against Underwriters is purely a maritime right created by federal maritime courts. The first error committed by the Fifth Circuit was its failure to recognize the maritime origin of this right and the need to apply maritime law to define the scope of the right.

During the trial of this matter, Taylor sought relief, including punitive damages, under the general maritime law. As a passenger aboard a vessel, Taylor's claim was

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[8] 247 U.S. 372 (1918).

[9] 317 U.S. 239 (1943).

[10] 398 U.S. 375 (1970).

founded upon the general maritime tort law.[11] At no point were state law claims urged by Taylor. Finally, the jury's verdict awarding punitive damages was made pursuant to instructions applying the general maritime law. Therefore, admiralty law furnished the *only* basis for the award of punitive damages.

The right to recover punitive damages had its origins in federal maritime law as early as *The Amiable Nancy*,[12] where the Supreme Court recognized the need to deter wanton or grossly negligent acts at sea. The Fifth Circuit acknowledged the availability of punitive damages arising from the unseaworthiness of a vessel, in *Complaint of Merry Shipping, Inc.* 650 F.2d 672 (5th Cir. 1981), citing the lengthy history of the doctrine in substantive maritime tort law and its avowed goal of deterrence.[13]

Throughout the development of this doctrine, federal courts have shaped and limited the recoverability of punitive damages; e.g., *Kopczynski v. The Jacqueline*, 742 F.2d 555 (9th Cir. 1984), *cert. denied*, 471 U.S. 1136 (1985) (limiting recovery to cases arising under the general maritime law and not under the Jones Act) and *Matter of P&E Boat Rentals*, 872 F.2d 642 (5th Cir. 1989) (ruling that punitive damages are not recoverable against employers without knowledge of employees' willful acts). These

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[11] *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). Notably, the Fifth Circuit erred in its published opinion when it categorized Taylor as a seaman. Neither the jury nor the trial court found him to be a seaman, nor was Drynorth his employer. *See*, answers to jury interrogatories and judgment of district court in *Taylor v. Drynorth*, attached on pp. 18a-21a of the appendix.

[12] 16 U.S. (3 Wheat.) 546 (1818).

[13] 650 F.2d at 625-6. The referenced quote is set forth at length infra at p.27.

cases recognize that maritime tort law developed a doctrine of punitive damages separate and apart from the common law or the laws of the several states, which must rely upon maritime law principles to give it substance and define its parameters.

b. When a Right of Recovery is Rooted in Federal Maritime Law, the Substance of that Right is Governed by Federal Law.

Because federal admiralty courts created the right to punitive damages in admiralty, these courts must consequently define and shape the contours of that right by applying principles of federal maritime law. This power and obligation to determine issues of substantive maritime law arises both from the jurisdiction conferred by the Constitution and the need for uniformity contemplated by that jurisdiction.

The Constitution invested the federal judiciary with exclusive control of admiralty jurisdiction so that a single uniform body of law would be enforced in all states of the Union, and conform as far as practicable to established principles of international maritime law so that United States law would not conflict with the law of other maritime nations. The crucial goal of this uniformity was the very practical need to protect maritime commerce from conflicting state laws and regulations.[14] To ensure

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[14] The Supreme Court, in *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875), explained the goal of the Framers in granting admiralty jurisdiction to the federal courts:

> The Constitution must have referred to a system of law co-extensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime

uniformity, the Framers of the Constitution also provided for the supremacy of federal substantive law over state law.[15]

In a pair of decisions at the beginning of this century, the Supreme Court established that a maritime law right is governed by maritime law no matter where the action is brought and emphasized the supremacy of federal maritime law over state law. The Court in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), explicitly established the supremacy of federal power over state law to promote uniformity of maritime law:

> No [state] legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. *Id.* at 216.

In *Chelentis v. Luckenbach Steamship Co.*, 247 U.S. 372 (1918) the Court, in addressing the limitations of the

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> law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states. *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1875).

See generally Justice Story's comprehensive analysis in *De Lovio v. Boit*, 7 F. Cas. 418 (C.C. Mass. 1815) (no. 3776).

[15] See, *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917), cited infra.

savings to suitors clause, held that a right sanctioned by maritime law must be determined by maritime law and not common law.[16]

Collectively, *Jensen* and *Chelentis* established that where uniformity or a specific maritime doctrine are at issue, it is the federal judiciary, not the state courts or legislatures, which must create and interpret federal admiralty law – a principle which the Supreme Court has reiterated on numerous occasions.[17]

Ultimately in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), this Court explained the need to create and define both maritime remedies as well as rights. The Court recognized "the incongruity of forcing the states to provide the sole remedy to effectuate duties that have no basis in state policy." The Court observed that "federal law, rather than state, is the more appropriate source of a remedy for violation of the federally imposed duties of maritime law." *Id.* at 357, n. 15.

The doctrine of uniformity is the motive force behind the exclusivity and supremacy of maritime law. The Court in *Moragne* justified creating a wrongful death action under general maritime law because:

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[16] 247 U.S. at 384.

[17] *Garrett v. Moore-McCormick Co.*, 317 U.S. 239, 245 (1943) where the Supreme Court explained the necessity of applying federal law to determine substantive rights by stating:

> The source of the governing law applied is in the national, not the state, governments . . . The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right originates. (citations omitted).

See also *Pope & Talbot v. Hawn*, 346 U.S. 406 (1953).

> it would assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. . . . Such uniformity not only will further the concerns of [federal legislation] but also will give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'

398 U.S. 401-402 (citing *The Lottawanna*).[18]

The same logic which compelled the result in *Moragne* applies with equal force to the facts of this case. A single federal rule as to the recoverability of punitive damages from an insurer *would* assure uniform vindication of federal policies and would alleviate the problems associated with accommodating 50 different state laws to a single admiralty right. Ironically, in the very case relied upon by the Fifth Circuit, *Wilburn Boat*, Justice Black recognized the same logical consequences as the *Moragne* Court which arise when a federal court creates a right in maritime law: "[S]hould we attempt to fashion an admiralty rule governing policy provisions, we would at once be faced with the difficulty of determining what should be the consequences of breaches." 348 U.S. at 319. This is

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[18] Most recently in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), the Court exercised its power to determine the scope of damages for a maritime law right that it had judicially created in the *Moragne* decision. In *Miles*, the Court placed limits upon the types of recovery a seaman could obtain under general maritime law. The Court, citing *Moragne*, declared that the federal judiciary was vested with the power to establish maritime law.

precisely what the Fifth Circuit failed to do – by disregarding the federal source of the right to punitive damages, the appellate court failed to "determine the consequences" of the right upon the plaintiff, the defendant and the defendant's insurers.

If the Fifth Circuit's decision is allowed to stand, the recoverability of every maritime punitive damage award in the future will depend entirely upon geography. The potential disruptions upon commerce which would be created by such a rule are myriad. For example, a vessel insurer's potential liability will change every time the vessel moves through the waters of a different state. A vessel owner will need to obtain coverage for every jurisdiction in which he foreseeably will operate. If a vessel goes off course and becomes grounded or collides in an unforeseen state's waters, the vessel's insurance coverage may not provide the vessel owner the same protection as vessel owners regularly operating in the state.

Perhaps the most dramatic potential example is the tort which occurs on the waters directly between two states. Theoretically, a vessel casualty on the boundary between a state where punitive damages are insurable and a state where such damages are not insurable could give rise to a situation where claimants on one vessel may recover punitive damages from an insurer while those on a second vessel – immediately across the state line – may not. Similarly, a deckhand who is injured when the vessel is in Alabama waters may theoretically recover punitive damages from the vessel owner's insurer while if his accident occurs moments later in Florida waters, he may not.

These examples illustrate the randomness which will result in maritime law should the Fifth Circuit decision stand. Whatever message is to be sent by the imposition

of punitive damages in maritime law, if it is to be effective, must be the same message. Otherwise, uniformity will be sacrificed for no apparent gain, save the creation of more work for maritime lawyers. *That* undesirable consequence need not occur if this Court will recognize the federal maritime nature of the right to punitive damages and undertake the analysis overlooked by the Court of Appeal.

c. *Wilburn Boat* is Inapplicable to the Facts of this case.

The foregoing discussion illustrates the uniquely maritime nature of the issue before the Fifth Circuit and the need for a federal maritime rule concerning the recoverability of punitive damages against an insurer. Despite the prevailing considerations of uniformity and the federal nature of maritime punitive damages, the Fifth Circuit abstained from resolving the issue before it, citing *Wilburn Boat* as the foundation for this approach. 972 F.2d at 668. The Fifth Circuit noted that the Court in *Wilburn Boat:*

> . . . determined that there was no federal admiralty rule regarding the breach of warranties in *marine insurance policies* and that the Court would not fashion one, but would instead apply state law.

972 F.2d at 668 (citations omitted) (emphasis added).

Ignoring what it had initially noted in an earlier recitation of the underlying facts – that no issue of interpretation of insurance policies was involved – the Fifth Circuit went on to cite its own jurisprudence for the following startling principle:

> Since 1955, this court, in addressing maritime cases, has interpreted *Wilburn Boat* to require "the application of state insurance law

> principles if there is no specific and controlling federal rule. [T]he *interpretation of a contract* of marine insurance is – in the absence of a specific and controlling federal rule – to be determined by reference to appropriate state law."

972 F.2d at 668 (emphasis added) (citations omitted).

This excerpt from the underlying opinion reveals the point at which the Fifth Circuit's reasoning went astray. At no point was the trial court *or* the Fifth Circuit asked to interpret contracts of marine insurance. To the contrary, the trial court specifically pretermitted consideration of coverage issues and any other issues of contract interpretation so that it could resolve a preliminary issue of tort law – whether punitive damages may be recovered from a party other than the tort feasor.

One would think that the Fifth Circuit could have appreciated the difference between contract and tort law and that *Wilburn Boat*, on its facts, bore no resemblance to the issue before it. Nevertheless, the Fifth Circuit stubbornly asserted that it must apply *Wilburn Boat*, because "interpretation of a contract of marine insurance" compelled this analysis.

A mere reading of *Wilburn Boat* should have convinced the Fifth Circuit that the case had nothing whatever to do with the facts in *Taylor*. The first sentence of that opinion, in fact, succinctly limits its scope to a single issue:

> This case raises questions concerning the power of states to regulate the terms and conditions of marine insurance contracts.

348 U.S. at 311. Nothing could be plainer than this statement by Justice Black. *Wilburn Boat* only applies to interpretation of marine insurance *contracts*. Since *Taylor v.*

Lloyd's did not involve any issue of regulation or interpretation of the terms of a marine insurance contract, *Wilburn Boat* did not apply.

What is astounding about the Fifth Circuit's opinion is that no intellectual attempt was made by that Court to analogize or explain the extension of *Wilburn Boat* beyond its limited facts. The Fifth Circuit, seemingly hypnotized by the words "marine insurance," automatically invoked *Wilburn Boat* with complete disregard for the fact that no contract issues existed and that no court had even applied *Wilburn Boat* to matters of pure maritime tort law.

Almost as troubling as the lower court's unfathomable application of *Wilburn Boat* is its startling misstatement of the analysis employed by Justice Black. At *no* point in the *Wilburn Boat* opinion was any statement made that, "in the absence of a specific and controlling federal rule", state law should govern interpretation of marine insurance. To the contrary, Justice Black prefaced all discussion with the query:

> (1) Is there a judicially established federal admiralty rule governing these warranties? (2) If not, should we fashion one?

348 U.S. at 314.

By requiring the second step, *Wilburn Boat* explicitly recognized the need to look first to the interests of uniformity before resorting to state law. The Fifth Circuit, by contrast, has now chosen to apply the first step alone to a factual situation not contemplated by the holding in *Wilburn Boat*. The result of this ill-chosen shortcut is the creation of a policy in the Fifth Circuit to abstain from any future revision or development of substantive maritime law.

The ultimate consequence of allowing this reasoning to go unchecked is the destruction of maritime law as a

vital, ongoing body of law. If there can be no new precedent in the Fifth Circuit, the admiralty jurisprudence will come to be replaced by state law as the years pass and new issues arise. The easiest and most effective means to assure that this does not continue is for this Court to grant certiorari and explain to the Fifth Circuit that *Wilburn Boat* does not control the outcome of this case or any other case of first impression in general maritime tort law. Rather, where admiralty courts have created substantive rights such as punitive damages, they must fashion not only the right, but the limits of that right.

d. *Wilburn Boat* Should be Limited to Its Facts or Overturned.

Believing that Wilburn Boat therefore has no application to the facts of this case, applicants would urge the Court to grant certiorari and proceed to a determination that punitive damages are not recoverable against an insurer as a matter of public policy. If, however, the court is concerned with the nagging presence of *Wilburn Boat* and the potential further abuse of its reasoning by federal courts, applicants would additionally seek certiorari to have this Court limit *Wilburn Boat* to its peculiar facts, or alternatively, to overturn it as being inconsistent with prior and subsequent Supreme Court decisions.

The *Wilburn Boat* decision has been criticized and questioned practically since the day it was rendered. The decision represents a prime example of a decision designed to achieve a fair result in a case with unusual, difficult facts; a combination which, as Justice Holmes noted, makes for bad law. *Wilburn Boat* did create "bad law" and left a startled maritime community in its wake.

The Supreme Court in *Wilburn Boat* was asked to decide whether the literal performance rule in a warranty in a marine insurance policy should be enforced against the owners of a houseboat situated on the waters of a small artificial lake between Texas and Oklahoma. The houseboat had been destroyed by a fire that was unrelated to the owners' breach of warranty. The Court, reluctant to enforce what to its eyes appeared an unduly harsh rule of strict compliance, instead ruled that although a marine insurance contract is a part of maritime law, state law could be applied to resolve the issue. The Court reasoned that an absence of abundant precedent showed a lack of federal interest in regulating this particular issue. Since states had displayed strong interest in regulating insurance, Justice Black was content to accord them the responsibility for making rules relating to the effect of a breach of warranty. In the case of Texas law, the harmless breach did not void the policy and plaintiffs were not left without a remedy.

The problem with the majority opinion as observed by a concurring Justice Frankfurter and a dissenting Justice Reed, is that, as a whole, a tremendous need exists for uniformity in marine insurance law in particular, and maritime law in general. Stressing the "local" nature of the controversy and the lack of connection to interstate commerce or traditional maritime activity, Justice Frankfurter "joined in a result restricted within this compass."

However, Frankfurter disparaged application of the same analysis where river and oceangoing commerce were concerned, noting:

> The court's opinion goes beyond the needs of the problem before it. Unless I wholly misconceive that opinion, its language would be invoked when cases so decisively different in

> degree as to be different in kind come before this court. It seems directed with equal force to ocean-going vessels in international maritime trade, as well as coastal, intercoastal and river commerce. Is it to be assumed that were the Queen Mary, on a world pleasure cruise, to touch at New York City, New Orleans and Galveston, a Lloyd's policy covering the voyage would be subjected to the varying insurance laws of New York, Louisiana and Texas?[19]

The decisions following *Wilburn Boat* from this Court all suggested that the radical Balkanization of the substantive maritime law to the whims of the several states feared by Justices Frankfurter and Reed would not occur. In several cases, this Court applied federal law to determine the validity of exculpatory clauses in towage contracts, a shipowner's rights to indemnity from a stevedore, and whether the admiralty law recognized the distinction between an invitee and licensee.[20] As one commentator observed, "These rules were no more 'established', than the rule of strict compliance ignored in *Wilburn*."[21] Nevertheless, recognizing its control over the development of substantive maritime law, this Court fashioned law to address new problems in areas where federal, and not state law, governed. In *Kossick v. United Fruit Company*, this Court stated that *Wilburn Boat* had no application to a case involving a maritime contract that

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[19] *Wilburn Boat Company v. Fireman's Fund Insurance*, 348 U.S. 310, 323 (1955).

[20] *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955); *Kemerac v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

[21] David Currie, Federalism and The Admiralty: "The Devil's Own Mess" 1960 S. Ct. Rev. 158, 217 (1960).

conflicted with a New York state statute. The Court dismissed *Wilburn Boat* by declaring

> The application of state law in that case was justified by the Court on the basis of a lack of any provision of maritime law governing the matter there presented. A concurring opinion, and some commentators have preferred to refer the decision to the absurdity of applying maritime law to a contract of insurance on a houseboat established in the waters of a small artificial lake between Texas and Oklahoma. Needless to say the situation presented here has a more genuinely salty flavor than that.

Kossick, 365 U.S. at 742.

Many lower courts recognized *Kossick* as a decision which limited *Wilburn Boat* to its facts or at least to interpretation of marine insurance contracts. *D.J. McDuffie v. Old Reliable Ins. Co.*, 608 F.2d 145 (5th Cir. 1979), *cert. denied*, 449 U.S. 830 (1980); *Gulfstream Cargo v. Reliance Ins. Co.*, 409 F.2d 974 (5th Cir. 1969). However, certain panels in the Fifth Circuit, including *Taylor*, ignore *Kossick*[22] and have even gone so far as to state that "despite the language in *Kossick* tending to limit the *Wilburn Boat* opinion to its facts, we believe that *Kossick* did an incomplete job of burying the *Wilburn Boat* obeisance to state contract law in certain cases involving marine contracts." *Irwin v. Eagle Star Ins. Co.*, 455 F.2d 827, 829-830. (5th Cir. 1972), *cert. denied*, 409 U.S. 852 (1972). Now, given the Fifth Circuit's attempted

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[22] *Transco Exploration Co. v. Pacific Employers Ins. Co.*, 869 F.2d 862 (5th Cir. 1989).

resuscitation of *Wilburn Boat* as an abstention doctrine, this Court should finish the job.[23]

II. THE FIFTH CIRCUIT'S DECISION IN *TAYLOR* IS IN CONFLICT WITH THE NINTH CIRCUIT'S INTERPRETATION OF *WILBURN BOAT*.

The *Taylor* decision not only misapplied *Wilburn Boat*, it created a conflict with existing Ninth Circuit jurisprudence. The Ninth Circuit, in *Bohemia, Inc. v. Home Insurance Co.*, 725 F.2d 506 (9th Cir. 1984), held that *Wilburn Boat* and *Kossick*, read together, require that state law can only be applied to issues of marine contract interpretation when: 1) no federal rule exists; *and* 2) when no need for uniformity exists. The *Bohemia* court thus recognized the two-part nature of the inquiry employed by this Court in *Wilburn Boat* and the further limitations of the *Kossick* decision.

By contrast, the Fifth Circuit has repudiated *Kossick* and has failed to apply the second prong of the *Wilburn Boat* test. By its failure to consider the need for uniformity of maritime tort law, the *Taylor* decision creates an irreconcilable conflict between the Circuits. This Court should therefore grant certiorari to resolve this serious division among the Courts of Appeal.

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[23] The confusion created by *Wilburn Boat* is illustrated by another Fifth Circuit decision, *Albany Insurance Company v. Anh Thi Kieu*, 927 F.2d 882 (5th Cir. 1991), *cert. denied*, 111 S. Ct. 279 (1991). The court in *Albany* chose to apply state law instead of an established federal rule of Uberrimae Fidei. In so doing, it declared that the application of state law to questions of marine insurance is by now "axiomatic". 927 F.2d at 886 and cited *Wilburn Boat* for the proposition that "the regulation of marine insurance is, in most instances, properly left with the states. *Id.*

III. Maritime law and policy prohibit the recovery of punitive damages from an insurer.

A. The history and purpose behind punitive damages in maritime law.

Having established the exclusive maritime nature of the right and the need for a federal maritime rule, applicants further ask this Court to find, as the district court did, that maritime law should and does prohibit a party from recovering punitive damages against an insured. The first step in this analysis is to examine the nature and purpose of punitive damages in maritime law. As the following discussion illustrates, the maritime law theory of punitive damages is based upon the twin policy goals of punishing individual conduct and deterring other individuals from pursuing the same or similar conduct – goals which are not fostered by allowing the bad actor to insure against such damages.

The first recognized case in U.S. admiralty law dealing with punitive damages was *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818). That case involved an action against the owners of a vessel whose crew plundered a Haitian schooner. Justice Story did not impose punitive damages on the owners, finding them liable only for compensatory damages. In discussing who might be liable for punitive damages in such a case, the court observed:

> If this were a suit against the original wrongdoers, it might be proper to go yet farther [than compensatory damages] and visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawlessness conduct. 16 U.S. at 558.

Clearly, Justice Story was concerned with identifying and punishing the wrongdoers and saw no point in providing an additional source of recovery for the plaintiffs against the shipowners whose liability would have been purely vicarious. See also *Gallagher v. The Yankee*, 9 F. Cas. 1091, (D.C. Cal. 1859) (No. 5196) aff'd 39 F. Cas. 781, 784 (C.C. Cal. 1859) (No. 18124).

In *Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. 1981), the Fifth Circuit determined that punitive damages may be recovered under the general maritime law upon a showing of willful and wanton misconduct by the shipowner. After reviewing the history of punitive damages in maritime law, the Court summarized the policy reasons for awarding punitive damages in maritime law as follows:

> Punitive damages, long established in our legal system, may be recovered when a wrongdoer has acted willfully and with gross disregard for the plaintiff's rights. They serve the purpose "of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example."
>
> Punitive damages should be available when a shipowner has willfully violated the duty to furnish and maintain a seaworthy vessel. The shipowner's duty stems from the recognition of "the hazards of marine service which unseaworthiness is placed on the men who perform it . . . and their helplessness to ward off such perils." Punitive damages would serve to deter and punish owners whose reckless acts increase these hazards. 650 F.2d at 625-626 (citations omitted).

The same policy reasons have been enumerated in other circuits. See, e.g. *In Re Marine Sulphur Queen*, 460 F.2d 89 (2nd Cir. 1972), *cert. denied*, 409 U.S. 982 (1972); *Complaint of Cambria Steamship Co.*, 505 F.2d 517 (6th Cir.

1974); *Protectus Alpha Navigation Co., Ltd. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379, 1385 (9th Cir. 1985); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied*, 402 U.S. 975 (1975).

This principal was recently reinforced by the Fifth Circuit in *Matter of P&E Boat Rentals, Inc.*, 872 F.2d 642 (5th Cir. 1989). In that decision, the Court held that

> "Punitive damages may not be imposed against a corporation when one or more of its employees decides on his own to engage in malicious or outrageous conduct. In such a case, the corporation itself cannot be considered the wrongdoer. If the corporation has formulated policies and directed its employees properly, no purpose would be served by imposing punitive damages against it except to increase the amount of the judgment."

Because punitive damages in admiralty are imposed solely to punish the wrongdoer, no purpose would be served in imposing the damages on another party – in the case of *P&E Boat Rentals*, the corporate employer – simply because that party can pay the damages. Rather, the deterrent/punishment effect could only be realized by imposing the damages on the actual party committing the offense.

B. The public policy behind punitive damages in maritime law is best served by not allowing defendants to insure against them.

Few courts sitting in admiralty have considered the issue of whether punitive damages may be recovered against an insurer under maritime law. Those which have, however, have uniformly concluded that maritime public policy forbids this result.

Two cases that address this issue are *Dubois v. Arkansas Valley Dredging Company, Inc.*, 651 F. Supp. 299 (W.D. La. 1987) and *Smith v. Frontlawn Enterprises, Inc.*, 1987 AMC 1130 (E.D. La. 1986). In both cases, the courts were confronted by facts very similar to the present case. Both courts held that public policy prevented the assessment of punitive damages against an insurer, concluding that the deterrence of wrongdoing would be undermined. The two decisions relied upon the Fifth Circuit's decision in *Northwestern National Casualty Company v. McNulty*, 307 F.2d 432 (5th Cir. 1962).

McNulty is one of the leading judicial expressions of the theory behind prohibiting the insurability of punitive damages for public policy reasons. The *McNulty* decision, authored by Judge John Minor Wisdom, dealt with the application of Florida and Virginia law concerning punitive damages in an automobile accident. Although this decision does not involve interpretation of maritime law, it does involve consideration of the Florida law of punitive damages which rests on the same principals of punishment and deterrence that are the cornerstone of the maritime law of punitive damages. As Judge Wisdom noted, punitive damages in Florida:

> [I]s an amount allowed over and above actual or compensatory damages. Its allowance depends on malice, moral turpitude, wantonness, the outrageous of the tort, and is awarded as a deterrent to others inclined to commit a like offense. 307 F.2d at 435 (citations omitted).

In *McNulty*, the Court evaluated the impact of allowing insurance for punitive damages when the purpose of such punitive damages was deterrence and punishment. In recognizing the contradiction inherent in such a state of affairs, Judge Wisdom observed as follows:

> Where a person is able to insure himself against punishment, he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct. It is not disputed that insurance against criminal fines or penalties would be void as violative of public policy. The same public policy should invalidate any contract of insurance against the civil punishment that punitive damages represent.
>
> If that person were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose. Such damages do not compensate the plaintiff for his injury, since compensatory damages already have made the plaintiff whole. And there is no point in punishing the insurance company; it has done no wrong. In actual fact, of course, in considering the extent of which the public is insured the burden would ultimately come to rest not on the insurance companies but on the public, since the added liability to the insurance companies would be passed along to the premium payer. Society would then be punishing itself for the wrong committed by the insured." 307 F.2d at 440-441.

Clearly, Judge Wisdom's analysis translates equally well to maritime law where punitive damages are imposed for precisely the same reasons as they are imposed in Florida. No purpose can be served by permitting punitive damages to be insured and consequently allowing a guilty party whom the law seeks to punish to shift the financial responsibility away from himself to an insurance company. Such a result would be not only unfair to the insurance company but more importantly to the vitality of the shipping industry as a whole which the maritime law has always regarded as an important factor in shaping policy. The net effect of allowing insurability for punitive damages is obvious – punitive damages will

be passed on to the public through increased premiums to be borne by overburdened vessel operators who have not participated in any wrongdoing or wrongful conduct. Just as punitive damages are assessed only against those individuals whose conduct is deemed to be willful or wanton and outrageous, so should those damages be paid by the individuals at fault and not indirectly by the public through costs passed on to the premium payer.[24]

CONCLUSION

The importance of granting certiorari in this case cannot be overstated. The misapplication of *Wilburn Boat* by the Fifth Circuit in *Taylor v. Lloyd's* threatens to strangle the future development of maritime tort law. This Court cannot permit a lower appellate court to decline its constitutionally mandated duty to determine the scope of maritime tort rights. To do so is to permit, in one decision, the accumulated precedent from *The Lottawanna* to *Miles v. Apex* to be cast aside, and to disburse Justice Story's cherished body of uniform admiralty law to the fifty states for safekeeping.

Such a dismal result need not occur if this Court will accept the responsibility for fashioning substantive maritime law which the Fifth Circuit believes it no longer possesses. A uniform rule precluding a tort feasor in admiralty from shifting liability to an insurer is consistent

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[24] William L. Prosser, Law of Torts, § 2, at 13 (5th ed. 1984) wherein he states "If punitive damages are supported by any sound policy, that policy would appear to demand that they shall not be covered by liability insurance.

with the deterrent purpose of punitive damages in maritime law and would further maritime commerce by providing a measure of certainty for vessel operators, insurers, and ultimately, the masters, seaman and passengers who work in the maritime industry.

Respectfully submitted,

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Albert TAYLOR, Jr., et al, Plaintiffs

Mrs. Albert Taylor, Jr.,
Plaintiff-Appellant,

v.

LLOYDS UNDERWRITERS
OF LONDON, et al.,

Defendants,

Steward Arthur Holmes, as representative
of Certain Underwriters at Lloyds,
London, Defendant-Appellee.

No. 91-3629.

United States Court of Appeals,
Fifth Circuit.

Sept. 24, 1992.

Injured seaman brought action seeking judicial declaration that earlier federal court punitive damages award in his favor and against company that chartered lift boat, which capsized was recoverable from the company's insurer. The United States District Court for the Eastern District of Louisiana, Lansing L. Mitchell, J., granted the insurer's motions for summary judgment concluding that general maritime law prohibited the collection of punitive damages from insurer. Seaman appealed. The Court of Appeals, Emilio M. Garza, Circuit Judge, held that law of state having greatest interest in resolutions of issue should have been applied, rather than general maritime law, when determining whether injured seaman could recover punitive damages from insurer.

Reversed and remanded.

Michel P. Wilty, Robert Burke Keaty, Keaty & Keaty, Lafayette, La., for Mr. & Mrs. Albert Taylor, Jr.

Paul N. Vance, Winston Edward Rice, Jon Wesley Wise, Rice, Fowler, Kingsmill, Vance, Flint & Booth, New Orleans, La., for appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before SMITH and EMILIO M. GARZA, Circuit Judges, and RAINEY,* District Judge.

EMILIO M. GARZA, Circuit Judge.

This is an appeal from a summary judgment. Albert Taylor, Jr. and his wife[1] originally filed suit against Lloyd's Underwriters, Institute of London Underwriters and Underwriters at Lloyd's, London (collectively "Lloyd's") in Louisiana state court, which Lloyd's later removed to federal court. In this action, Taylor sought a judicial declaration that an earlier federal court punitive damages award in his favor and against Drynorth (USA), Inc. was unrecoverable from Lloyd's, Drynorth's insurer. The district court, concluded that general maritime law prohibits the collection of punitive damages from an insurance company, granted Lloyd's motion for summary judgment. Taylor now appeals. Finding that the district

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* District Judge of the Southern District of Texas, sitting by designation.

[1] Mr. Taylor has since passed away, and Mrs. Taylor is pursuing this action. The plaintiffs will be referred to as "Taylor".

court erred in applying general maritime law to this dispute, we reverse and remand.

I

On October 16, 1985, the DMC-1-a liftboat chartered to Drynorth – capsized in the Gulf of Mexico. As a result of the capsize, Taylor and several other seamen were injured. Alleging that the DMC-1 was unseaworthy, Taylor brought suit against Drynorth in federal court under general maritime law. Following trial the jury returned a verdict, assessing $751,780 in compensatory damages and $500,000 in punitive damages against Drynorth. Drynorth has not operated since 1986 and, at all times relevant to the events surrounding this dispute, Drynorth has been insolvent. Accordingly, Drynorth's insurers paid the majority of the compensatory damages award and will be responsible for the payment of any punitive damages awarded.

Taylor subsequently filed a declaratory judgment action in Louisiana state court against Lloyd's, seeking a declaration that the three insurance policies[2] Lloyd's issued to Drynorth provide coverage for punitive damages and that Lloyd's is required to pay the damages award assessed against Drynorth. Lloyd's removed the case to federal court, and the parties filed cross-motions for summary judgment. Lloyd's argued that coverage for

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[2] The three insurance policies are: (i) Policy/Certificate number 22191 – the Comprehensive General Liability Insurance policy, (ii) Policy/Certificate number 11877 – the Excess Marine Liability Insurance policy; and (iii) Policy/Certificate number 22183 – the Protection and Indemnity Insurance policy.

punitive damages does not exist under any of the three insurance policies covering Drynorth at the time of the DMC-1's capsize. Taylor maintained, however, that the Comprehensive General Liability Insurance (CGL) policy provides coverage for punitive damages.[3]

Although the district court set forth the language of the CGL policy in its Order and Reasons, the district court did not analyze the language of any of the insurance policies to determine whether the language provided coverage for punitive damages; instead, the district court concluded that it had to first determine whether to apply Louisiana state law or general maritime law to the dispute. Concluding that general maritime law applies and that maritime law disallows the recovery of punitive damages from an insurance company, the district court granted Lloyd's motion for summary judgment.

II

Taylor argues that, because Lloyd's removed this case to federal court on the basis of diversity jurisdiction, the

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[3] The CGL policy states in part that:

> the company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of [a] bodily injury or [b] property damages to which this insurance applies, caused by an occurrence . . . , but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

Record Excerpts at tab 5, *Taylor v. Lloyd's*, No. 91-3629 (5th Cir. filed Oct. 22, 1991).

district court, in its capacity as an *Erie*[4] court, should have applied Louisiana law. Taylor argues that the district court erred in applying maritime law and in granting Lloyd's motion for summary judgment. Lloyd's, on the other hand, maintains that the dispute is a maritime matter, and contends that the district court properly applied general maritime law to disallow the collection of the punitive damages award from Lloyd's.

In determining the applicable law governing the interpretation of the CGL policy, our analysis begins with *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955).[5] In *Wilburn Boat*, the Supreme Court determined that there was no federal admiralty rule regarding the breach of warranties in marine insurance policies and that the Court would not fashion one, but would instead apply state law. *Id.* at 315-16, 75 S.Ct. at 371. Since 1955, this court, in addressing maritime cases, has interpreted *Wilburn Boat* to require "the application of state insurance law principles if there is no specific and controlling federal rule." *Truehart v. Blandon*,884 F.2d at 226, *citing Transco Exploration Co. v. Pacific Employers Ins. Co.*, 869 F.2d 862, 863 (5th Cir.1989); *sell also Ingersoll-Rand Fin. Corp. v. Employers Ins.*, 771 F.2d 910, 911-12 (5th Cir. 1985), *cert denied*, 475

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[4] *Erie R.R. Co. v Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed 1188 (1938).

[5] Because the CGL policy "insures against certain maritime risks and losses," it provides maritime insurance within the meaning of *Wilburn Boat, supra. See Truehart v. Blandon*, 864 F.2d 223, 226 (5th Cir.1989) (Because the "policy insures against certain maritime risks and losses . . . we conclude that it provides maritime insurance within the meaning of *Wilburn Boat*. . . . "

U.S. 1046, 106 S.Ct. 1263, 89 L.Ed.2d 573 (1986) ("[T]he interpretation of a contract of marine insurance is – in the absence of a specific and controlling federal rule – to be determined by reference to appropriate state law.") *citing Wilburn Boat, supra.*

Lloyd's has presented this court with three cases in support of the proposition that general maritime law prohibits the collection of punitive damages from an insurance company. *See Dubois v. Arkansas Valley Dredging Co.*, 651 F.Supp. 299 (W.D.La.1987); *Smith v. Front Lawn Enterprises, Inc.*, No. 83-5147, 1987 AMC 1130 (E.D.La., Sept. 29, 1986); *Northwestern Nat'l Casualty Co. v. McNulty*, 307 F.2d 432 (5th Cir.1962). However, these cases do not establish a specific and controlling federal rule disallowing the recovery of punitive damages from an insurance company.

In *Smith*, the district court considered whether the Protection & Indemnity policy provided coverage for punitive damages claims and, after examining the insurance policy, the court found that the insurance policy in question did not provide coverage for punitive damage claims.[6] The *Smith* court based its decision to disallow the recovery of punitive damages on the specific language of the insurance policy at issue, reasoning that "the clear

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[6] The policy in *Smith* did not expressly enumerate coverage for punitive damage liability. The policy language read in part:

> this Company hereby undertakes to pay such claims as the assured . . . shall have become legally liable to pay and shall have paid on account of: Loss of Life of, or injury to, or illness of, any person.

Smith, 1987 AMC at 1130.

language of this portion of the policy is that payment will be made for injury or illness, thus suggesting compensatory damages." *Smith*, 1987 AMC at 1130. The district court addressed the question whether public policy should permit an insurance company to pay for punitive damages only in the penultimate paragraph of the two-page opinion. That paragraph states: "In conclusion, the Court notes that it has been held, in relation to an automobile liability policy, that public policy forbids an insurer and an insured to enter into an insurance contract covering punitive damages." *Id.* at 1131, *citing McNulty*, 307 F.2d at 432.

The issue whether punitive damages may be collected from an insurance company was also addressed by the district court in *Dubois v. Arkansas Valley Dredging Co.*, 651 F.Supp. 299 (W.D.La. 1987). The *Dubois* court hypothesized that all requisites to a recovery of punitive damages were satisfied – that is, that the insured's actions were willful and wanton and that the insurance policy provided coverage for punitive damages – but then held that, in any event, "enforcement of the insuring provisions of the policy would be contrary to public policy." *Id.* at 302. Relying on *McNulty* and *Smith*, the *Dubois* court concluded that general maritime law prohibits the collection of punitive damages from an insurance company, reasoning that public policy disallows recovery of punitive damages from an insurance company. *Id.* at 302-03.

Both district court cases rely heavily on *McNulty*[7] to arrive at their conclusions that punitive damages are not

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[7] In *McNulty*, after examining an automobile liability policy in a diversity case, the court articulated the policy behind disal-

recoverable against an insurance company under general maritime law. The thirty-year old *McNulty* decision did not even involve federal law; it was a diversity case, where the district court interpreted the public policy of Virginia and Florida. Additionally, *McNulty,* involved automobile insurance, not maritime insurance. The *Smith* court, then, while purporting to rely on *McNulty,* nevertheless primarily based its decision on the express policy language, buttressing its opinion with a citation to *McNulty*. Similarly, in *Dubois,* the court relied on both *NcNulty* and *Smith* to reach its conclusion that maritime law prohibits the recovery of punitive damages from an insurance company. *See Dubois,* 651 F.Supp. at 299.

We find that these cases have not established a specific and controlling federal rule disallowing the recovery of punitive damages from an insurance company. The district court, therefore, should have applied the law of the state having the greatest interest in the resolution of the issues. *See Truehart v. Blandon,* 884 F.2d 223, 226 (5th Cir.1989) ("In identifying the appropriate state law to apply, we look to the state having the greatest interest in the resolution of the issues"), *citing Transco Exploration Co. v. Pacific Employers Ins. Co.,* 869 F.2d 862, 863 (5th Cir.1989). Accordingly, we find that the district court

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lowing wrongdoers to insure themselves against punitive damages, stating:

> It is not disputed that insurance against criminal fines or penalties would be void as violative of public policy. The same public policy should invalidate any contract of insurance against the civil punishment that punitive damages represent.

McNulty, 307 F.2d at 440.

erred in granting summary judgment in favor of Lloyd's on the basis of maritime law.

III

For the foregoing reasons, we REVERSE and REMAND to the district court to determine whether punitive damages may be recovered under the appropriate state law.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-3629

ALBERT TAYLOR, JR., ET AL.,

Plaintiffs,

MRS. ALBERT TAYLOR, JR.,

Plaintiff-Appellant,

versus

LLOYDS UNDERWRITERS OF LONDON, ET AL.

Defendants,

STEWART ARTHUR HOLMES, as representative of Certain Underwriters at Lloyds, London,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON SUGGESTION FOR REHEARING EN BANC
(Opinion September 24, 5 Cir., 1992, ___ F.2d ___)
(Filed Oct. 23, 1992)

Before SMITH, EMILIO M. GARZA, Circuit Judges and RAINEY, District Judge.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having

requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
United States Circuit Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MR AND MRS. ALBERT TAYLOR JR.	:	CIVIL ACTION
	:	NUMBER: 90-1403
VERSUS	:	SECTION LLM
LLOYDS UNDERWRITERS, ET AL	:	(Filed Jul. 12, 1991)
* *	:	

JUDGMENT

Pursuant to Rule 58 of the Federal Rules of Civil Procedure,

IT IS HEREBY ORDERED that judgment be and is entered granting summary judgment in the referenced matter in favor of defendants, Stuart Arthur Holmes, for and on behalf of Certain Underwriters at Lloyds, London subscribing to Gulf Coast Marine Certificate No. 11877, each for his own and not one for the other, Ronald Malcolm Pateman, for and on behalf of Certain Underwriters at Lloyds, London, subscribing to cover note no. DEL:50/85/1 each for his own and not one for another; and Seumus Iain Cawley, for and on behalf of certain underwriters at Lloyds, London subscribing to cover note no. DEL:M 822/855 each for his own and not one for the other, and dismissing with prejudice all claims by plaintiffs, Mr and Mrs. Albert Taylor, Jr., each party to bear its own costs.

New Orleans, Louisiana this 12th day of July, 1991.

/s/ Lansing L. Mitchell
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MRS. ALBERT TAYLOR	CIVIL ACTION
VERSUS	NO. 90-1403
LLOYD'S UNDERWRITERS	SECTION "LLM"

(Filed
Feb. 27, 1991)

ORDER AND REASONS

This matter is before this Court on Plaintiffs' Motion for Partial Summary Judgment and on Defendant's Cross-Motion for Summary Judgment pertaining to the issue of insurance coverage for punitive damages in this case.

We have carefully reviewed the memoranda submitted by counsel for both parties. Counsel for plaintiff argues that because defendant's counsel removed this case to federal court on the basis of diversity jurisdiction, this Court sits in an "Erie" capacity and must therefore apply Louisiana state law in this matter. Defense counsel maintains that the dispute is a maritime matter, and must be resolved by application of maritime law.

This matter arises out of a judgment rendered by this Court in the case entitled "Mr. and Mrs. Albert Taylor, Jr. v. Drynorth (USA), Inc.," Civil Action No. 89-2623. In that action, the jury awarded plaintiffs $751,780.00 in compensatory damages for injuries sustained by Mr. Taylor as the result of the capsizing of the DMC-1, a vessel chartered and operated by Drynorth. The jury also ordered Drynorth to pay $500,000.00 in punitive damages based on

their finding of gross negligence on the part of Drynorth. This judgment became final on September 9, 1989.

Drynorth was at the time of trial and is now an insolvent corporation and has not operated since 1986. As of this time, the payment of compensatory damages has been made via insurance coverage. Similarly, the payment of punitive damages, if permitted, will not be made by Drynorth, but by defendant Lloyd's Underwriters.

Defendant argues that no coverage for punitive damages exists under the various policies of liability insurance in effect on behalf of Drynorth at the time that the DMC-1 capsized. Conversely, plaintiffs maintain that the language of the Comprehensive General Liability Policy (CGL) does provide coverage for punitive damages.

Regarding the CGL policy, the language in question which addresses the terms and conditions of coverage is found in certificate No. 22191. Under Section I of Form 6395A, the policy reads:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay because of a) Bodily Injury, or b) Property Damages to which this insurance applies, caused by an occurrence, . . . , the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

Hence, the issue as framed by plaintiff's counsel is whether the language of the CGL policy provides insurance coverage for punitive damages assessed against the defendant. Before addressing this issue, however, this

court must first determine whether Louisiana state law or federal maritime law should apply.

Taylor was a Jones Act seaman. His claim arose out of and was tried under maritime law. The policies in question were purchased to provide coverage for Drynorth's maritime operations. This court finds no merit in plaintiff counsel's argument that we must sit in an "Erie" capacity and apply Louisiana state law. Accordingly, the propriety of insurance coverage for punitive damages shall be determined by application of maritime law.

In *Northwestern National Gas Company v. McNulty*, 307 F.2d 432 (CA-5 1962), Judge Wisdom addressed the public policy considerations revolving around insurance coverage for punitive damages:

> The policy considerations . . . would seem to require that the damages rest ultimately as well as nominally on the party actually responsible for the wrong. If that person were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose. Such damages do not compensate the plaintiff for his injury, since compensatory damages already have made the plaintiff whole. And there is no point in punishing the insurance company; it has done no wrong. In actual fact, of course, and considering the extent to which the public is insured, the burden would ultimately come to rest not on the insurance companies, but on the public, since the added liability to the insurance companies would be passed along to the premium payers. Society would then be punishing itself for the wrong committed by the insured.

307 F.2d at 441.

McNulty dealt with an interpretation of Florida and Virginia law prohibiting insurance coverage of punitive damages. However, in denying insurance coverage for punitive damages, this same philosophy has been adopted by federal district courts in Louisiana applying federal law. *See Dubois v. Arkansas Valley Dredging Co., Inc.*, 651 F.Supp. 299 (W.D. La. 1987), and an unpublished opinion by Judge Henry Mentz in *Smith v. Front Lawn Enterprise,* No. 83-5147, 1987 AMC 1130 (E.D. La. 1986).

As stated previously, Drynorth is an insolvent company and the payment of any damages would come not from its corporate coffers but from its insurer. Such an act defies the theory of punitive damages and would not punish the wrongdoer.

Because it is the determination of this Court that maritime law shall apply and would deny coverage, the issue of whether the language of Drynorth's CGL policy provides for the payment of punitive damages need not be reached[1].

It is therefore ORDERED that plaintiffs' Motion for Partial Summary Judgment be and hereby is DENIED, and defendant's Cross-Motion for Summary Judgment be and hereby is GRANTED.

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[1] Likewise, we do not reach the issue of exhaustion of policy limits raised by defendant.

New Orleans, Louisiana, this 26th day of February, 1991.

/s/ Lansing L. Mitchell
UNITED STATES SENIOR
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ALBERT TAYLOR, JR.	*	CIVIL ACTION
	*	NO. 89-2623
VERSUS	*	SECTION "LLM"
DRYNORTH (U.S.A.),	*	JUDGE
INC., ET AL	*	LANSING L. MITCHELL
	*	(Filed Sept 7, 1989)

* *

JUDGMENT

This action came on for trial before the Court, the Honorable Lansing L. Mitchell, Senior District Judge, presiding, the issues having been duly tried, a verdict having been duly rendered by the jury on August 11, 1989 in favor of plaintiff, Albert Taylor, Jr., and against defendant, Drynorth (U.S.A.), Inc., and reasons for judgment having been duly issued this date,

IT IS HEREBY ORDERED, ADJUDGED AND DECREEED that there be judgment in favor of Albert Taylor, Jr. and against the defendant, Drynorth (U.S.A.), Inc. for the following amounts:

Physical pain and suffering, past, present and future	$ 25,000.00
Permanent disability	$ 70,000.00
Mental anguish or suffering, past, present and future	$ 175,000.00
Medical expenses, past and future	$ 105,680.00

Loss of past
earnings and
future earning capacity.....$346,100.00

FURTHERMORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Mrs. Albert Taylor, Jr. against Drynorth (U.S.A.), Inc. for loss of consortium in the amount of $30,000.00

ADDITIONALLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment in favor of intervenors First Horizon Insurance Co. and Offshore Hammers, Inc. in the amount of $90,357.91 paid to Albert Taylor, Jr. for worker's compensation, and in the additional amount of $46,871.74 paid to Albert Taylor, Jr. for medical expenses.

ADDITIONALLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Albert Taylor, Jr. in the amount of $500,000.00 for punitive damages against Drynorth (U.S.A.), Inc.

FINALLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be interest at the legal rate provided by law to run on the amount of $289,939.68 from December 30, 1985 until paid, together with all court costs and expert fees.

New Orleans, Louisiana, this 6th day of Sept., 1989.

/s/ Lansing L. Mitchell
UNITED STATES SENIOR
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT TAYLOR, JR. — CIVIL ACTION

VERSUS — No. 89-2623
c/w 89-2626

DRY NORTH (U.S.A.), INC., ET AL

SECTION "LLM"

INTERROGATORIES

1. Do you find from a preponderance of the evidence that the defendants' negligence was a legal cause of any of Mr. Taylor's injuries?

   Please answer Yes or No. Yes ✓ No _

   If your answer was yes, please go to question No. 2. If your answer was no, do not answer any further questions. Please sign and date the form.

2. What sum of money, if any, do you find will fairly compensate Mr. Taylor for the following damages, if any, he sustained that were legally caused by the accident of October 16, 1985?

A.	Physical Injury, Pain and Suffering, Past, Present and Future;	$ 25,000
B.	Permanent Disability	$ 70,000
C.	Mental Anguish or Suffering, Past, Present and Future	$175,000
D.	Medical Expenses, Past and Future	$105,680
E.	Loss of Past Earnings and Future Earning Capacity	$346,100
	(Total 2A - E above)	$721,780

Please go to question No. 3.

3. Do you find from a preponderance of the evidence that the accident on October 16, 1985, was a legal cause of Mrs. Albert Taylor's loss of consortium of her husband?

   Please answer Yes or No. Yes ✓ No _

   If your answer to question No. 3 is yes, please answer question No. 4. If your answer is no, please go to question No. 5.

4. What amount of money, if any, will fairly compensate Mrs. Albert Taylor for loss of consortium of her husband? $ 30,000

   Please go to question No. 5.

5. Do you find that the acts of defendants were done willfully, intentionally or with callous and reckless indifference to plaintiff's rights so as to entitle him to an award of punitive damages?

   Please answer Yes or No. Yes ✓ No _

   If your answer is no, answer no further questions. Please sign and date the form.

   If yes, please go to question No. 6.

6. What amount of money do you find Mr. Taylor is entitled to recover in the form of punitive damages? $500,000

   Please sign and date form.

   New Orleans, Louisiana, this 11 day of August, 1989.

   /s/ Willard R. Gibbs Jr.
   FOREPERSON

U.S. Constitution

Art. III

Section 2, Clause 1. Jurisdiction of Courts

Section 2. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – To Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Constitution

Art. VI

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the constitution or Laws of any State to the Contrary notwithstanding.

§ 1254. Courts of Appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C.

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C.

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $50,000 computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title –

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) The legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

28 U.S.C.

§ 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

No. 92-1107

Supreme Court, U.S.
FILED
JAN 21 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

STEWART ARTHUR HOLMES, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY GULF COAST MARINE CERTIFICATE NO. 11877, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER; RONALD MALCOLM PATEMAN, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO INSURANCE EVIDENCED BY COVER NOTE NO. DEL:50/85/1, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER; AND SEUMUS IAIN COWLEY, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY COVER NOTE NO. DEL:M822/85, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER,

Petitioners,

vs.

MR. AND MRS. ALBERT TAYLOR, JR.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, in the absence of any entrenched federal precedent in General Maritime Law, the Court of Appeals properly reversed the District Court's summary judgment, and remanded this action with instructions to determine whether punitive damages are insurable under the applicable state law.

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No. 92-1107

In The

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October Term, 1992

STEWART ARTHUR HOLMES, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY GULF COAST MARINE CERTIFICATE NO. 11877, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER; RONALD MALCOLM PATEMAN, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO INSURANCE EVIDENCED BY COVER NOTE NO. DEL:50/85/1, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER; AND SEUMUS IAIN COWLEY, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY COVER NOTE NO. DEL:M822/85, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER,

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MR. AND MRS. ALBERT TAYLOR, JR.,

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RESPONDENTS' BRIEF IN OPPOSITION

FACTUAL CHRONOLOGY

The salient facts which should ultimately determine the outcome of this dispute predate the casualty in which Albert Taylor, Jr. was critically injured and nearly drowned on October 16, 1985.

At the time of this casualty, the vessel DMC-1 was owned by Diamond M. Construction Company and operated under bareboat charter to Petitioners' insured. The vessel charter required that Drynorth (USA), Inc. obtain insurance covering the vessel's operation and use. Accordingly, the Petitioners' insured purchased coverage, including protection and indemnity, umbrella, and comprehensive general liability policies. Drynorth (USA), Inc.'s insurance was placed through RISC, Inc. of Houston, Texas. The Comprehensive General Liability policy (Certificate No. 22191) in question was prepared, then issued and dated at Houston, Texas on April 8, 1985.[1] The "general insuring conditions" of Petitioners' Comprehensive General Liability policy issued to Drynorth (USA), Inc. in the State of Texas provides that "the company [Petitioners] will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage."

Together with the Comprehensive General Liability policy (Certificate No. 22191), RISC, Inc. simultaneously placed excess

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1. Certificate No. 22191 was formulated by Petitioners using the standard CGL policy form (form 6395A) with the "watercraft exclusion" deleted by special endorsement (endorsement no. 9).

Gulf Coast Marine "Excess Maritime Liability" policy (Gulf Coast Marine Certificate No. 11877) which Respondent also maintained provides coverage for punitive damages, was prepared and issued to Petitioners' insured at New Orleans, Louisiana.

umbrella insurance for Petitioners' insured in the London market. By explicit endorsement, the excess umbrella coverage purchased and delivered to Petitioners' insured in Texas along with the other policies placed through RISC, Inc. set forth a specific exclusion of coverage for punitive damages.

The referenced policies, including Petitioners' Comprehensive General Liability policy, remained in force and effect on October 16, 1985. Mr. Taylor's personal injury action arose out of the operation and use of the watercraft chartered by Petitioners' insured. In the underlying personal injury action, the District Court entered a single money judgment against Drynorth (USA), Inc. The District Court's judgment stated the sum which Petitioners' insured had become legally obligated to pay as damages in Mr. Taylor's personal injury action. Drynorth (USA), Inc.'s appeal from the personal injury judgment was dismissed by the Fifth Circuit. Subsequently Petitioners' insolvent insured sought no further review. On this basis, the Taylors initiated this declaratory judgment action seeking payment of the referenced judgment according to the insuring conditions of the policies issued to Petitioners' insured.

REASONS FOR DENYING THE WRIT

There is no valid reason for the Court to grant this Petition for Certiorari and the petition sets forth none. This case involves the application of the analysis stated in *Wilburn Boat Company v. Fireman's Fund Insurance Company*, 348 U.S. 310; 75 S. Ct. 368, 99 L. Ed. 337 (1955) and most recently applied in *Albany Insurance Co. v. Anh Thi Kieu*, 927 F.2d 882 (5th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 279, 116 L. Ed. 2d 231 (1991).

Petitioners' position and the District Court's decision below are unsupported by any decision of this Court concerning marine insurance. Moreover, the insurability of punitive damages is not precluded by any federal admiralty precedent among the Courts of Appeal or any United States District Court decision which predates the issuance of the subject comprehensive general liability policy. Consistent with the reasoning of both *Wilburn Boat* and general maritime law choice of law principles, the Court of Appeals below reversed the District Court's deicision. *See Taylor v. Lloyds Underwriters of London*, 972 F.2d 666, *reh. en banc denied*, 978 F.2d 713 (5th Cir. 1992).

The decision of the Court of Appeals is not in conflict with any other Federal Court decision regarding the application of *Wilburn Boat* in the context of marine insurance policy construction where no "entrenched federal precedent" of general maritime law controls the disputed issue. In the absence of any conflict among the Circuits, this decision of the Court of Appeals preserves the uniformity of the general maritime law and further upholds the consistency and confidence with which the general maritime law of marine insurance is applied throughout our judicial system.

The Court of Appeals recognized and held that, in the absence of controlling general maritime case law, federal courts sitting in admiralty may look to the appropriate state law in determining the

rules under which marine insurance policies shall be interpreted. Consistent with prior jurisprudence and Constitutional authority, the decision of the Court of Appeals below preserves the interests of uniformity in general maritime law, promotes continuity between marine and land-based insurance practice, and thus fosters confidence among maritime actors.

Petitioners' comprehensive general liability policy (Certificate 22191) in question covered both land-based and maritime risks. The subject comprehensive general liability policy was issued and delivered at Houston, Texas to Petitioners' insured, Drynorth (USA), Inc., a Texas corporation. For well over a decade prior to Petitioners' issuance of the subject policy. Texas courts have recognized the insurability of punitive damages.[2] Consequently, because there existed no public policy bar to the insurability of punitive damages under the *non-maritime* coverages of Petitioners' comprehensive general liability policy, contingent upon the construction of the "insuring conditions" and applicable exclusions, punitive damages would be covered. However, irrespective of how clearly the parties may express their affirmative intent to insure punitive damages in a single comprehensive general liability policy (such as Certificate 22191), Petitioners insist that land-based punitive damages would be insured while punitive damages deemed to arise under general maritime law would not. The blatant inconsistency of the nonsensical result urged by Petitioners offends the integrity of maritime law.

Texas law had long recognized the insurability of punitive damages and Petitioners had issued and delivered the subject

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2. *Dairyland County Mutual Insurance Company v. Wallgren*, 477 S. W. 2d 341 (Tex. Civ. App. 1972); and *Home Indemnity Company v. Tyler*, 522 S. W. 2d 594 (Tex. Civ. App. 1975).

comprehensive general liability policy in Texas *prior to* a contrary decision by *any* Federal admiralty court. Upon this backdrop, the Fifth Circuit's observations in *Albany Insurance Company v. Anh Thi Kieu* cite are particularly appropriate:

> Texas has a strong interest in the protection of its citizens, including Anh Thi Kieu, against the overbearing tactics of insurance underwriters.[3]

In light of this legitimate and important state interest, the *Albany Insurance* Court further reasoned that:

> The application of unfamiliar federal maritime rules engenders undesirable uncertainty among maritime actors; this Court can easily avoid such uncertainty by the application of "already well-developed state laws."[4]

Therefore, the decision by the Court of Appeals in the case *sub judice* fosters confidence among the parties to marine insurance contracts by achieving continuity between marine and land-based insurance policy construction.

As observed by Petitioners, "the right to recover punitive damages in admiralty law had its origins in federal maritime law as early as 1818." It was therefore foreseeable by Petitioners *prior to the issuance and delivery of the subject comprehensive general liability policy*, that covered operations may lead to the imposition of punitive damages. As is certainly true in the London insurance

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3. *Albany Insurance Company v. Anh Thi Kieu*, 927 F.2d 882, 891 (5th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 279, 116 L. Ed. 2d 231 (1991).

4. *Albany Insurance v. Anh Thi Kieu*, 927 F.2d 882, 888 (5th Cir. 1991).

market, "scriveners of insurance policies are acutely aware of the meaning and effect of the language."[5] As evidenced by the terms of the excess umbrella policy issued to Petitioners' insured, by explicit endorsement, underwriters in the London market know precisely how to exclude coverage for punitive damages.

It behooves underwriters to make coverage exclusions clear and unmistakable. This axiom has been consistently recognized in insurance practice and the case law of this Court for over one hundred years.[6] According to specific and controlling rules of marine insurance interpretation, the insurer must bear "the burden of proving non-coverage under the exclusions in the policy," and therefore "the insurer must, at its peril, make the policy exclusions clear and unmistakable. Otherwise, as here, there is coverage." *See Home Benefit Association v. Sargent*, 142 U.S. 691, 12 S. Ct. 332 (1892); *Mayronne Mud & Chemical v. T-W Drilling Company*, 168 F. Supp. 800 (E.D. La. 1958); Buglass, *Maritime Insurance and the General Average in the United States*, (2nd Cir. Edition, 1981), at page 86.

The decision of the Court of Appeals below neither offends the characteristic features of the general maritime law nor interferes with the proper harmony and uniformity of general maritime law in its international and interstate relations. As in the great majority of jurisdictions in the United States, there is no public policy against allowing insurance coverage against punitive damages in either Texas or Louisiana. See Schumaier & McKinsey, *The Insurability of Punitive Damages*, 72 ABA Journal 68 (March 1, 1986).

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5. *See Eagle Leasing Corporation v. Hartford Fire Insurance Company*, 540 F.2d 1257 (5th Cir. 1976), *cert. denied*, 431 U.S. 967, 97 S. Ct. 2926, 53 L. Ed. 2d 1063 (1977).

6. *See Home Benefit Association v. Sargent*, 142 U.S. 691, 12 S. Ct. 332 (1892).

Historically, state law has played a particularly central role in marine insurance relationships. As emphasized by the Fifth Circuit in *Albany Insurance*, this flows primarily from the recognition that, through experience, "states are far better equipped to balance the risks that each party to an insurance contract endures."[7] The modern rule adopted by the majority of states allowing the insurability of punitive damages as a feature of private contract has worked effectively in the land-based insurance industry. Absent "entrenched federal precedent," Petitioners' stance demands that this Court inject a severe limitation on the contractual freedoms of insurers and their insureds. Petitioners cite no feature unique to maritime law that warrants such a constriction of contractual rights.

Instead, Petitioners present their "horrible scenario" which, in reality, exposes the fallacy of Petitioners' contentions. Petitioners erroneously maintain that according to Fifth Circuit's decision in the instant case, "a vessel insurer's potential liability will change every time the vessel moves through the waters of a different state" and "the outcome of lawsuits applying general maritime law [will] be determined by the fortuity of the state next to which an ocean-going or river vessel is located at the time of collision or accident."[8] In order to imagine their "horrible scenario," Petitioners necessarily must have closed their eyes to controlling general maritime law choice of law rules. In *Eagle Leasing Company v. Hartford Fire Insurance Company*, 540 F.2d 1257 (5th Cir. 1976), *cert. denied*, 431 U.S. 967, 97 S. Ct. 2926, 53 L. Ed. 1063 (1977), the Fifth Circuit applied Missouri law to the interpretation of a marine insurance policy issued and delivered in St. Louis.

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7. *Albany Insurance Company v. Anh Thi Kieu*, 927 F.2d at page 887.

8. Petitioners' "Petition for a Writ of Certiorari," at page 7.

Notwithstanding the vessel casualty's fortuitous occurence in the Gulf of Mexico off the coast of Galveston, Texas, the Fifth Circuit in *Eagle Leasing* applied Missouri law as required pursuant to maritime choice of law rules. Likewise, in *Albany Insurance Company v. Anh Thi Kieu*, 927 F.2d 882 (5th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 279, 116 L. Ed. 2d 231 (1991), the Fifth Circuit stated:

> The court in maritime cases *must* apply general federal maritime choice of law rules. In this case, we *must* consider the choice of law rules which specifically govern marine insurance disputes.

Albany Insurance Company v. Anh Thi Kleu, 927 F.2d 882, 890 (5th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 279, 116 L. Ed. 2d 231 (1991) (emphasis added).

In *Albany Insurance*, the Fifth Circuit concluded that, in the context of a marine insurance dispute where there is no entrenched federal precedent, the state or states in which the policy was formed, issued, and delivered determines which states "have sufficient contact with the policy and the parties that their laws *can* be applied."[9] Of these "eligible" states, "the court must then determine which state has the greatest interest in the resolution of the issues."[10] Accordingly, the certainty and confidence instilled by the choice of law rules which specifically govern marine insurance disputes completely dispel the "horror" of the examples envisioned by Petitioners. Under Federal general maritime law

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9. *Albany Insurance Company v. Anh Thi Kieu*, 927 F.2d 882, 891 (5th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 279, 116 L. Ed. 2d 231 (1991).

10. *Id., citing Truehart v. Blandon*, 884 F.2d 223, 226 (5th Cir. 1989).

choice of law rules, the state or states whose laws may apply absent "specifically controlling federal authority" is determined at the issuance and delivery of the insurance policy. Irrespective of where a maritime casualty may occur, this choice of law analysis under general maritime law remains constant as the insured vessel moves through the waters of different states.

In several instances since 1955, this Honorable Court has declined to revisit *Wilburn Boat Company v. Fireman's Fund Insurance Company*, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955). At this juncture, there is neither need nor reason to revisit or overturn the *Wilburn Boat* decision. The thin criticisms of the Fifth Circuit's decision in *Taylor* have been raised before this Court on past occasions. This Honorable Court has consistently denied certiorari where language and analysis identical to that cited by the *Taylor* court has been employed. In *Eagle Leasing v. Hartford Fire Insurance Company*, 540 F.2d 1257 (5th Cir. 1976), *cert. denied*, 431 U.S. 967, 97 S. Ct. 2926, 53 L. Ed. 2d 1063 (1977), the Honorable Judge John Minor Wisdom, who authored the *McNulty*, decision relied upon by Petitioners, stated:

> In the absence of specifically controlling federal authority, the law of the state where a marine insurance contract is issued and delivered governs the construction of its language.[11]

Earlier, in *Irwin v. Eaglestar Insurance Company*, 455 F.2d 827 (5th Cir. 1972), *cert. denied*, 409 U.S. 118, 93 S. Ct. 118, 34 L. Ed. 95 (1972), the Fifth Circuit panel, which again included the Honorable Judge Wisdom, echoed Justice Harlan's observation

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11. *Eagle Leasing Corporation v. Hartford Fire Insurance Company*, 540 F.2d 1257, 1261 (5th Cir. 1976).

that "the application of state law in [*Wilburn Boat*] was justified by the Court on the basis of a lack of any provision of maritime law governing the matter there presented."[12] More recently, in *Ingersoll-Rand Financial Corp. v. Employers Insurance of Wausau*, 771 F.2d 910 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1263, 89 L. Ed. 2d 573 (1986), and *Albany Insurance Company v. Anh Thi Kieu*, 927 F.2d 882 (5th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 279, 116 L. Ed. 2d 231 (1991), certiorari was denied where the language of the Fifth Circuit's analysis mirrored the *Taylor* decision. Petitioners present no new reason why *Wilburn Boat* should be revisited. Rather, the position taken by Petitioners would indeed serve to undermine the public confidence in the marine insurance industry by driving an unjustifiable wedge between marine and land-based insurance policy interpretation.

Finally, Petitioners erroneously maintain that the Ninth Circuit's holding in *Bohemia, Inc. v. Home Insurance Company*, 725 F.2d 506 (9th Cir. 1984), is at odds with the Fifth Circuit's decision in *Taylor*. A simple comparison of the *Taylor* and *Bohemia* decisions reveals their dispositive distinctions and conclusively establishes the inaccuracy of Petitioners' position. Based on an "exhaustive review" of the pertinent case law, the Ninth Circuit affirmed the District Court's application of the federal maritime rule governing the policy provisions at issue in *Bohemia*. Once the *Bohemia* court identified such a controlling admiralty rule, the Ninth Circuit's further exposition concerning what may have happened in lieu of such "entrenched federal precedent" definitively exemplifies judicial dicta. In contrast to *Bohemia*, the Fifth Circuit in *Taylor* specifically determined and explained in detail that there was no entrenched maritime precedent specifically on point. Accordingly, there is no conflict whatsoever between *Bohemia* and the outcome reached by the Court of Appeals in the

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12. *Irwin v. Eaglestar Insurance Company*, 455 F.2d 827, 829 (5th Cir. 1972).

case sub judice. Petitioners' claim of conflict between the Circuits is entirely unfounded.

CONCLUSION

In lieu of any conflict among the Circuits or insult to the constitutionally-protected doctrine of general maritime law uniformity, and in the absence of contrary entrenched federal precendent, this Honorable Court is respectfully urged to deny this Petition for Writ of Certiorari.

Respectfully submitted,

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No. 92-1107

IN THE

Supreme Court of the United States

OCTOBER TERM 1992

STEWART ARTHUR HOLMES, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY GULF COAST MARINE CERTIFICATE NO. 11877, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER; RONALD MALCOLM PATEMAN, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY COVER NOTE NO. DEL:50/85/1, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER; AND SEUMUS IAIN COWLEY, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY COVER NOTE NO. DEL:M822/85, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER,

Petitioners,

—v.—

MR. AND MRS. ALBERT TAYLOR, JR.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM 1992

No. 92-1107

STEWART ARTHUR HOLMES, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY GULF COAST MARINE CERTIFICATE NO. 11877, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER; RONALD MALCOLM PATEMAN, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY COVER NOTE NO. DEL:50/85/1, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER; AND SEUMUS IAIN COWLEY, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY COVER NOTE NO. DEL:M822/85, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER,

Petitioners,

—v.—

MR. AND MRS. ALBERT TAYLOR, JR.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

Applicant, The Maritime Law Association of the United States ("MLA"), moves the Court for permission to file an *amicus curiae* brief in support of the Petition for a Writ of Certiorari filed by Stewart Arthur Holmes, for and on Behalf of Certain Underwriters at Lloyd's, London, Subscribing to Insurance Evidenced by Gulf Coast Marine Certificate No. 11877; Ronald Malcolm Pateman, for and on Behalf of Certain Underwriters at Lloyd's, London, Subscribing to Insurance Evidenced by Cover Note No. DEL:50/85/1; and Seumus Iain Cowley, for and on Behalf of Certain Underwriters at Lloyd's, London, Subscribing to Insurance Evidenced by Cover Note No. DEL:M822/85 ("Petitioners"). Petitioners have given consent to the MLA to file an *amicus* brief, but Respondents have refused to consent. Accordingly, leave to file must be sought pursuant to Rule 37.2.

NATURE OF APPLICANT'S INTEREST

MLA has a very strong interest in the disposition of this case. MLA is a nationwide bar association founded in 1899. It has a membership of about [illegible] attorneys, federal judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates.

MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests—shipowners, charterers, cargo owners, shippers, forwarders, port authorities, seamen, longshoremen, passengers, marine insurance underwriters and other maritime claimants and defendants.

MLA's purposes are stated in its Articles of Association:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, *to promote uniformity in its enactment and interpretation*, to furnish a forum for the discussion and consideration of problems affecting the

> Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

(Emphasis added.)

In furtherance of these objectives MLA, during the ninety-three years of its existence, has sponsored a wide range of legislation dealing with maritime matters, including the Carriage of Goods by Sea Act[1] and the Federal Arbitration Act.[2] The MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[3]

MLA is also participating in several projects of a maritime legal nature undertaken by agencies of the United Nations, including its Commissions on Trade Law ("UNCITRAL") and Trade and Development ("UNCTAD"). It works closely with the International Maritime Organization ("IMO").

MLA has actively participated, as one of some fifty national maritime law associations constituting the Comité Maritime International,[4] in the movement to achieve maximum interna-

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[1] 46 U.S.C. §§ 1300-1315.

[2] 9 U.S.C. §§ 1-15.

[3] *E.g.*, 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376; implementation of the 1972 Convention for Preventing Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted in* 6 M. M. COHEN, BENEDICT ON ADMIRALTY, Doc. No. 3-4 at 3.35 to 3-78.2 (7th rev'd ed. 1990) (hereinafter "BENEDICT"), *see* 33 C.F.R. ch. 1, subch. D, Special Note, at 160 (1987); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

[4] These now include the national associations of Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Croatia, Czechoslovakia, Denmark, Egypt, Finland, France, Germany, Greece, Hong Kong, Ice-

tional uniformity in maritime law through the medium of international conventions.[5]

MLA believes uniformity in maritime law, both national and international, is of great importance. This concern has been repeatedly expressed by our membership and standing committees. For example, in 1975 the MLA Standing Committee on Uniformity of U.S. Maritime Law recommended that steps be taken to persuade congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted at the MLA Annual Spring Meeting on April 25, 1975.[6] A substantially identical resolution was adopted by the American Bar Association in 1976. This policy has been reaffirmed by the MLA on several occasions, most recently in a 1986 resolution.[7]

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land, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, D.P.R. Korea, Marocco, Mexico, The Netherlands, Nigeria, Norway, Panama, Peru, Philippines, Poland, Portugal, Russian Federation, Senegal, Singapore, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay and Venezuela.

[5] *E.g.*, Assistance and Salvage (1910), 37 Stat. 1658 (1913), *reprinted in* 6 BENEDICT, Doc. No. 4-1 at 4-2 to 4-10; Ocean Bills of Lading (The Hague Rules) (1924), 120 L.N.T.S. 155, *reprinted in* 6 BENEDICT, Doc. No. 1-1 at 1-2 to 1-19; Collision (1910), *reprinted in* 6 BENEDICT, Doc. No. 3-2 at 3-11 to 3-19; Limitation of Liability of Owners of Sea-Going Ships (1957), *reprinted in* 6 BENEDICT, Doc. No. 5-2 at 5-11 to 5-29; Maritime Liens and Mortgages (1967), *reprinted in* 6A BENEDICT, Doc. No. 8-3 at 8-25 to 8-32; Civil Liability for Oil Pollution Damages (1969), U.N.T.S. 1409, *reprinted in* 6 BENEDICT, Doc. No. 6-3 at 6-62.103 to 6-76.3; and Limitation of Liability for Maritime Claims (1976), *reprinted in* 6 BENEDICT, Doc. No. 5-4 at 5-32.1 to 5-44.3.

[6] MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

[7] MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

MLA has, in furtherance of the uniformity policy and resolutions, filed *amicus* briefs in a number of cases, including a number of briefs accepted by this Court.[8]

It is also the policy of MLA to file briefs as *amicus curiae* only when important issues of maritime law are involved and the Court's decision may substantially affect the uniformity of maritime law.

Such a situation exists in this case. The Court's opinion in *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310 (1955), has inflicted two injuries on the uniformity doctrine since the case was decided. One of these injuries—the inherent impairment to uniformity created by the Court's endorsement of the application of state law to marine insurance issues—was predicted by two of the Justices who participated in that decision. The second injury was the creation of differing standards for application of state law by district and circuit courts in interpreting *Wilburn*, some of which forego any consideration of the need for uniformity and ignore the role of judicial precedent as a source of maritime law.

Both of *Wilburn's* injuries to uniformity have produced difficulties for all maritime interests because the result in otherwise identical cases can turn solely on geographical differences. Such a result is unfair and is precisely what the framers of the Constitution sought to avoid by placing maritime law under national control.

Moreover, maritime commerce and the courts themselves are burdened when uniformity is breached, for both the likelihood and length of litigation are increased when the governing law is unpredictable and parties are therefore encouraged to gamble on the possibility of a favorable result.

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[8] *E.g.*, *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). For a more comprehensive listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

Because of these considerations, MLA in 1991 passed a resolution supporting efforts to overrule *Wilburn* legislatively by inserting in an appropriate federal statute a provision that "[t]he interpretation and effect of policies of marine insurance and other insurances of marine risks shall be governed by the general maritime law and statutes of the United States . . . ."[9]

MLA CAN MAKE A UNIQUE CONTRIBUTION ON RELEVANT ISSUES

MLA's interest in the uniformity and predictability of U.S. maritime law and the collective experience of its members in dealing with the effects of this Court's decision in *Wilburn* gives MLA a broader perspective than the parties to this particular suit. MLA can comment objectively about the need for review by this Court in order to promote national uniformity on the issues presented.

Dated: January 22, 1993

Respectfully submitted,

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[9] MLA Minutes, MLA Doc. No. 688 at 9851-53 (1991).

IN THE

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OCTOBER TERM, 1992

No. 92-1107

STEWART ARTHUR HOLMES, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY GULF COAST MARINE CERTIFICATE NO. 11877, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER; RONALD MALCOLM PATEMAN, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY COVER NOTE NO. DEL:50/85/1, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER; AND SEUMUS IAIN COWLEY, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY COVER NOTE NO. DEL:M822/85, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Maritime Law Association of the United States ("MLA") respectfully submits this brief as *amicus curiae* in support of the Petition for Certiorari by Stewart Arthur Holmes, for and on Behalf of Certain Underwriters at Lloyd's, London, Subscribing to Insurance Evidenced by Gulf Coast Marine Certificate No. 11877; Ronald Malcolm Pateman, for and on Behalf of Certain Underwriters at Lloyd's, London, Subscribing to Insurance Evidenced by Cover Note No. DEL:50/85/1; and Seumus Iain Cowley, for and on Behalf of Certain Underwriters at Lloyd's, London, Subscribing to Insurance Evidenced by Cover Note No. DEL:M822/85 ("Petitioners").

QUESTIONS OF LAW PRESENTED

Whether *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310 (1955), should be overruled as disruptive of the uniformity required for treatment of maritime claims?

Whether the Fifth Circuit, in conflict with the Ninth Circuit, erred in failing to consider the need for uniformity before applying state law to a marine insurance contract?

INTEREST OF *AMICUS CURIAE*

This is stated in the motion which precedes this brief.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Court's majority opinion in *Wilburn* has indeed generated the troublesome host of problems predicted by the concurring and dissenting Justices. The decision has not only ordained fragmentation in lieu of development of marine insurance law on all questions not specifically governed by an existing federal maritime rule, but also encouraged courts to spurn even established marine insurance doctrines in favor of a

hodgepodge of state rules, without regard to the need for uniformity. *Wilburn* should therefore be overruled.

The Fifth Circuit, in contrast to the Ninth Circuit, has lost sight of the fact that a preemption analysis, standing alone, is not adequate to determine whether state law can be applied, even according to *Wilburn*. Thus, in addition to the exaltation of discordant state laws, *Wilburn* has produced conflicting interpretations, some of which, including the decision below, discard the constitutionally-mandated uniformity requirement as a separate element of the inquiry. If *Wilburn* is not overruled, the Court should correct the Fifth's Circuit's failure to consider independently the need for uniformity before applying state law to a marine insurance issue.

REASONS FOR GRANTING THE WRIT

I

WILBURN SHOULD BE OVERRULED BECAUSE UNIFORMITY IN MARINE INSURANCE LAW IS ESSENTIAL TO MARITIME COMMERCE.

Because of the special need for predictability and reliability of rights and obligations in maritime commerce, the Constitution places maritime law and jurisdiction in the hands of the national government, the Admiralty Clause mandating that "all Cases of admiralty and maritime Jurisdiction" fall to the "judicial Power of the United States . . . ." U.S. CONST., art. III, § 2, cl. 3. The principle mandating uniform treatment of maritime cases is not a vacant theoretical requirement, but rather was designed to afford fairness to all maritime litigants by having their conduct and rights governed by the same rules:

> [T]he convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things wherein those

> relations bring them in contact, there should be a uniform law founded on natural reason and justice. . . .
>
> One thing, however is unquestionable: The Constitution must have referred to a system of law co-extensive with, and operating uniformly in, the whole country. It certainly could not have been the intent to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

The LOTTAWANNA, 88 U.S. (21 Wall.) 558, 575 (1875).

As Justice Frankfurter observed in his concurring opinion in *Wilburn*, nowhere is the need for uniformity greater than in the area of marine insurance:

> The business of marine insurance often may be so related to the success of many manifestations of commercial maritime endeavor as to demand application of a uniform rule of law designed to eliminate the vagaries of state law and to keep harmony with the marine insurance laws of other great maritime powers.

348 U.S. at 323 (citations omitted). Justice Reed, in dissent, accurately perceived the pernicious effect which the majority opinion has since exercised, stating:

> the Court's decision strikes deep into the principle of a uniform admiralty law and will have the result of unduly burdening maritime commerce. . . .
>
> It is one thing to allow the States to add a remedy or create a new cause of action for certain incidents arising out of maritime activity. It is quite another thing to relinquish an entire body of substantive law making for a whole phase of maritime activity to the States. Such action does

> violence to the premise upon which the admiralty jurisdiction was constructed.

Id. at 327, 333. *See id.* at 327-29, 330, 333-34. Because of the need for predictable and uniform rules in marine insurance, the decision has been severely criticized. *See, e.g., Lexington Ins. Co. v. Cooke's Seafood*, 686 F. Supp. 323, 328 & n.6 (S.D. Ga. 1987), *aff'd*, 835 F.2d 1364 (11th Cir. 1988).

The magnitude of unpredictability created by *Wilburn* is enormous, for the making of a marine insurance agreement commonly involves international as well as interstate activities, and the ship's sphere of operations and the origins and ties of an injured person add further geographical contacts.[1] Parties to maritime endeavors not only cannot predict whether federal maritime law or state law will apply to their insurance rights and obligations, but also are confronted with the additional uncertainty of which state may be deemed to have the "greatest interest in the resolution of the issues." *Taylor v. Lloyd's Underwriters of London*, 972 F.2d 666, 669 (5th Cir. 1992); Petitioners' Brief at 8a. *Accord, Illinois Constructors Corp. v. Morency & Associates, Inc.*, 802 F. Supp. 185, 188 (N.D. Ill. 1992) (citing cases). *See, e.g., Albany Insurance Company v. Anh Thi Kieu*, 927 F.2d 882, 890-91, *rehearing en banc denied*, 934 F.2d 1263 (5th Cir.), *cert. denied*, 60 U.S.L.W. 3266 (1991). In view of the global nature of maritime commerce and the variety of parties in insurance cases, it is difficult to determine which state or even which nation may ultimately be found to have the greatest interest. Moreover, the state with the great-

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[1] As observed by a district court: "Bearing in mind that ships, fishing vessels in particular, often operate in the waters of several or many states, to allow for different standards of coverage where trading limits have been breached according to where a vessel sank, or where the insurance policy providing coverage was issued, etc., would have a severely deleterious effect on uniformity in maritime law." *Lexington* , 686 F. Supp. at 328 & n.7, *quoted with approval in Port Lynch, Inc. v. New England International Assurety of America, Inc.*, 754 F. Supp. 816 (W.D. Wash. 1991).

est interest may decline to intrude its domestic regulations into the field of marine insurance by specifically excluding marine insurance from its insurance regulations and providing that general maritime law is to govern such issues. *See, e.g., Lexington*, 686 F. Supp. at 328; *Miller v. American Steamship Owners Mutual Protection and Indemnity Co.*, 509 F. Supp. 1047, 1049-52 (S.D.N.Y. 1981).

But *Wilburn's* noxious influence is much wider than its holding, for the decision's praise of state involvement in marine insurance and the Court's pronouncement that it would surrender "the regulation of marine insurance . . . [to] the States"[2] has encouraged courts to reject judicially-created marine insurance rules in favor of state law as the Fifth Circuit did below, selecting state law over earlier federal precedent. 972 F.2d at 668-69. And in *Albany*, the Fifth Circuit identified *uberrimae fidei* as an established federal judge-made rule of maritime insurance law applicable to the case before it, but rejected the doctrine in favor of a Texas law which allowed a recovery prohibited by the maritime rule. 927 F.2d at 888-90.[3] A disregard for judge-made law and the consequent decay of federal marine insurance law were among the consequences Judge Frankfurter feared *Wilburn* would engender:

> It cannot be that by this decision the Court means suddenly to jettison the whole past of the admiralty provision of Article III and to renounce requirements for nationwide

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[2] The repeated references to "regulation" and "regulatory power" in *Wilburn* suggest that the Court confused regulation of insurance companies with interpretation of insurance policies. *See* 348 U.S. at 314, 316 (four references), 317, 318 (four references), 318-19, 319 (two times), 320 (two times), 321. The power of states to impose conditions on entities doing business within their jurisdictions is of course entirely distinct from the power of state law to control interpretation of maritime contracts within the admiralty jurisdiction.

[3] Courts in other jurisdictions continue to apply the doctrine. *See* discussion *infra* at __.

> maritime uniformity, except insofar as Congress has specifically enacted them, in the field of marine insurance.
>
> It is appropriate to recall that the preponderant body of maritime law comes from this Court and not from Congress. Judicial enforcement of nationwide rules regarding marine insurance is, as my brother REED cogently shows, deeply rooted in history. What reason is there for abruptly turning over, pending action by Congress, to the crazy-quilt regulation of the different States what so long has been the business of the courts?

348 U.S. at 323 (citations omitted).

Without a course correction by this Court, marine insurance law will cease to exist, except as a contradictory melange of state rules. Particularly in view of its constitutional responsibilities as steward of the principle of uniformity, *e.g.*, *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160 (1920), the Court should guard the role of the judiciary as a source of maritime law as authoritative as any congressional enactment. *See generally* Hon. John R. Brown, U.S.C.J., Admiralty Judges: Flotsam on the Sea of Maritime Law? (Inaugural Nicholas J. Healy Lecture on Admiralty Law, delivered November 5, 1992 at N.Y.U. School of Law).

Finally, the underpinning for *Wilburn*—that issues arising from a fire on a houseboat used exclusively on an inland lake were so local as not to require the creation of a uniform maritime rule on breach of warranties—has been dislodged by *Sisson v. Ruby*, 497 U.S. 358 (1990), which teaches that the local flavor of the facts of a case does not override the national character of the jurisdiction, issues, interests and governing law. *Sisson's* holding requires at minimum a reconsideration of *Wilburn's* vitality.

Because *Wilburn* endorsed the application of state law to marine insurance, the rights of all parties interested in an insurance policy—the insurers, the insured, and anyone to whom the insured may have some liability—can and now does depend on

geographical happenstance. Since this result, typified by the instant case, contradicts the constitutional mandate requiring national uniformity in cases within the maritime jurisdiction and *Kossick v. United Fruit Company*, 365 U.S. 731 (1961), was not sufficient to correct the damage, *Wilburn* should be overruled.

II

AT MINIMUM, THE CONFLICT IN *WILBURN'S* INTERPRETATION SHOULD BE RESOLVED IN FAVOR OF THE RULE REQUIRING CONSIDERATION OF UNIFORMITY ISSUES, PARTICULARLY AS TO PUNITIVE DAMAGES.

When restricted to its exact holding, *Wilburn* held no more than that where there is no maritime rule governing the question and where the circumstances are such that the constitutional uniformity edict does not require the courts to fashion a rule, courts may apply state insurance law to fill the gap. 348 U.S. at 316. Nonetheless, the disparity between the Court's holding and its tribute to state law has led the circuit courts to reach differing interpretations of *Wilburn* which in turn have lead to further uncertainty and unpredictability in insurance cases.

Some of these conflicts center on a particular issue, such as whether the doctrine of *uberrimae fidei* is of mandatory application to marine insurance policies. *Compare Albany*, 927 F.2d at 889-90 *with, e.g., Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689, 695 (11th Cir. 1984), *vacated in part, adhered to in relevant part*, 779 F.2d 1485 (11th Cir. 1986), *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9 (2d Cir. 1986), *cert. denied*, 480 U.S. 932 (1987), *and A/S Ivarans Rederei v. Puerto Rico Ports Authority*, 617 F.2d 903 (1st Cir. 1980). But these conflicts are just corollaries of the central conflict on whether, in the absence of a federal marine insurance rule, a court must also examine the need for uniformity and go on, if that need is great, to formulate a rule.

This uniformity requirement was by no means ignored by the *Wilburn* Court, which emphasized the two part nature of the inquiry by specifically enumerating the "crucial questions" as: "(1) Is there a judicially established federal admiralty rule governing these warranties? (2) If not, should we fashion one?" 348 U.S. at 314.

The second part of the inquiry prescribed by *Wilburn* was necessary to comply with the constitutionally-required uniformity considerations controlling the relationship between state and federal law articulated by the Court in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917):

> it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. . . . [N]o such legislation is valid if it . . . works material prejudice to the characteristic features of maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself.

Nonetheless, the Fifth Circuit, no doubt influenced by the *Wilburn* opinion's lavish praise of state regulation, now has dispensed altogether with the uniformity prong of the *Wilburn* inquiry, holding that "this court, in addressing maritime cases, has interpreted *Wilburn Boat* to require 'the application of state insurance law principles if there is no specific and controlling federal rule.' " *Taylor*, 972 F.2d at 668 (citations omitted); Petitioners' Brief at 5a. *Accord*, *Magnolia Marine Transport Co. v. LaPlace Towing Corp.*, 964 F.2d 1571, 1577 (5th Cir. 1992) ("state law governs construction of marine insurance contracts except where it is displaced by admiralty law"). Other circuits, most pointedly the Ninth, hold that "state law will control the interpretation of a marine insurance policy only in the absence

of a federal statute, a judicially fashioned admiralty rule, or a need for uniformity in admiralty practice." *Bohemia, Inc. v. Home Ins. Co.*, 725 F.2d 506, 510 (9th Cir. 1984).

The need for uniformity is especially great in the fields of marine insurance and punitive damages, for without the ability to estimate the scope of the risk, even so basic a task as the setting of premiums is reduced to a guessing game. Because of the marked differences among the laws of the states on whether punitive damages may be recovered against an insurer, *see, e.g.*, cases cited in 7A APPLEMAN INSURANCE LAW AND PRACTICE § 4492.05 (1979 & Supps.), 6B *id.* § 4252 nn. 8, 10 & accompanying text, *id.* § 4312 nn. 18-18-26 & accompanying text, a failure to correct the Fifth Circuit's disregard of the uniformity requirement ensures that chance alone will govern cases involving insurers' liability for punitive damages. Such a prospect is particularly appalling in view of the care to which the courts have gone to fashion a uniform standard governing availability of punitive damages in maritime cases.

A strong statement by this Court that in the absence of a federal rule, a court must consider independently the need for uniformity before it can apply state law would not only resolve the general conflict between the Fifth Circuit view and the Ninth Circuit view, but might also curtail or even cure conflicts on the more narrow issues, such as *uberrimae fidei*. Conversely, a failure to correct the Fifth Circuit's analysis of *Wilburn* and its ensuing error in its choice of governing law will guarantee a proliferation of clashing rules and results affecting so significant an issue as punitive damages.

CONCLUSION

We most respectfully urge this Honorable Court to grant the Petition for Certiorari.

Dated: January 22, 1993

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City of Brooklyn and the County of Kings; I am over the age of eighteen years and not a party to the within action; my business address is: One Battery Park Plaza, New York, New York 10004.

On January 22, 1993, I served the within Motion to File *Amicus Curiae* Brief and Brief in Support of the Petition for a Writ of Certiorari in re: "Stewart Arthur Holmes, for and on Behalf of Certain Underwriters at Lloyd's, London, Subscribing to Insurance Evidenced by Gulf Coast Marine Certificate No. 11877, Each for His Own and Not One for the Other; Ronald Malcolm Pateman, for and on Behalf of Certain Underwriters at Lloyd's, London, Subscribing to Insurance Evidenced by Cover Note No. DEL:50/85/1, Each for His Own and Not One for the Other; and Seumus Iain Cowley, for and on Behalf of Certain Underwriters at Lloyd's, London, Subscribing to Insurance Evidenced by Cover Note No. DEL:M822/85, Each for His Own and Not One for the Other, *Petitioners*, *versus* Mr. and Mrs. Albert Taylor, Jr., *Respondents*" in the United States Supreme Court, October Term 1991, No. 92-1107, on the Parties in said action by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at New York, New York, addressed as follows:

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All Parties required to be served have been served.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on January 22, 1993 at New York, New York.

/s/ LIZABETH L. BURRELL
LIZABETH L. BURRELL

No. 92-1107

MOTION FILED
JAN 22 1993

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STEWART ARTHUR HOLMES, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY GULF COAST MARINE CERTIFICATE NO. 11877, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER; RONALD MALCOLM PATEMAN, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S LONDON SUBSCRIBING TO INSURANCE EVIDENCED BY COVER NOTE NO. DEL:50/85/1, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER; AND SEUMUS IAIN COWLEY, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY COVER NOTE NO. DEL:M822/85, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER,

Petitioners,

—v.—

MR. AND MRS. ALBERT TAYLOR, JR.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION AND BRIEF ON THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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OCTOBER TERM, 1992

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STATEMENT OF INTEREST OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AND MOTION FOR LEAVE TO INTERVENE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American Institute of Marine Underwriters (AIMU) hereby requests permission to file a brief *amicus curiae* in this matter. Consent of all parties has been duly requested. Petitioner has consented to the filing of the attached brief. No response from Respondent has been received to requests for consent by phone and by telefax.

AIMU was founded in 1898 and is a national trade association of over ninety insurance companies, each of which is authorized to engage in the business of marine insurance in one or more states of the United States. Because its membership underwrites approximately ninety percent of the marine insurance written in the United States, the issues of this case are of extreme importance to AIMU and its member companies on their efforts to maintain uniformity in and consistent application of the laws affecting maritime commerce and marine insurance. An issue of very special significance to AIMU and its member companies is presented in this case. The decision of the Court of Appeals for the Fifth Circuit held that the decision as to whether or not punitive damages may be assessed against a marine insurer in a maritime dispute should be resolved by the courts of the several states.

AIMU's interest in this appeal stems from its desire for uniformity and certainty in maritime law throughout the United States. The Fifth Circuit's decision that there is no established federal maritime law on the subject of recoverability of punitive damages is contrary to the great weight of authority and will seriously affect the American marine insurance market.

In filing this brief *amicus curiae*, AIMU is acting in support of the American and international marine insurance communities. Uniformity of admiralty law is the area of vital concern to AIMU. Because of the expertise

developed by petitioner on issues relating to marine insurance, it would be of assistance to the Court to hear its views on the problems presented in this case.

AIMU respectfully prays that this Honorable Court accept its brief *amicus curiae* in support of the Petition for Writ of Certiorari.

Respectfully submitted,

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BRIEF OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

QUESTIONS PRESENTED

1. As a matter of public policy, should an award of punitive damages under the general maritime law be recoverable against the insurer of the party against whom damages were assessed?

2. Is the scope of maritime punitive damages an issue of maritime law?

SUMMARY OF ARGUMENT

Maritime public policy does not permit the award of punitive damages against an insurer. Federal law must determine the scope of maritime punitive damages, a federally created remedy. It is improper for a federal admiralty court to abandon this determination to state courts as the Fifth Circuit has done in this case. Maritime law must be uniform.

ARGUMENT

I

AWARD OF PUNITIVE DAMAGES AGAINST AN INSURER VIOLATES MARITIME PUBLIC POLICY

Public policy does not permit recovery of punitive damages from an insurance company. *Dubois v. Arkansas Valley Dredging Co.*, 651 F. Supp. 299 at 302-03 (W. D. LA. 1987). Punitive damages are awarded to punish and to deter. See Complaint of *Merry Shipping, Inc.*, 650 F. 2d 622 (5th Cir. 1981). No such purpose is served by imposing punitive damages on a nonguilty party just because that party may be perceived as a "deep pocket". Matter of *P & E Boat Rentals, Inc.*, 872

F. 2d 642 (5th Cir. 1989). Punishment or deterrent effect can only be achieved by imposing punitive damages on the guilty. Admiralty courts have uniformly rejected attempts to impose punitive damages on an insurer. Dubois, *supra*; *Smith v. Frontlawn Enterprises, Inc.*, 1987 AMC 1130 (E. D. LA. 1986). *Northwestern National Casualty Co. v. McNulty*, 307 F. 2d 432 (5th Cir. 1962).

II

FEDERAL LAW DETERMINES THE SCOPE OF MARITIME PUNITIVE DAMAGES

Federal law has created and defined the remedy of punitive damages in maritime cases. As part of the exercise of admiralty jurisdiction, federal admiralty courts, have provided for punitive damages in certain well defined situations. Where willful or wanton misconduct is shown, punitive damages may be awarded against the wrongdoer in order to deter such conduct. Because admiralty courts specifically allow such damages in order to punish, it is apparent that there is an established federal rule on the issue.

The constitutional authority and responsibility to determine the limits and scope of a federally created right rest with the federal courts. The Admiralty Clause of the Constitution confers exclusive jurisdiction on the federal courts on the issue of the scope of the federally created right to punitive damages in Maritime matters.[1]

Where federal admiralty courts have established a remedy such as punitive damages, federal courts must also define the scope of that remedy. It is improper for

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[1] U.S. Const. art. III, § 2, cl. 1.

an admiralty court to abandon its exercise of control over federally established rights under the general maritime law.

III

MARITIME LAW MUST BE UNIFORM

Uniformity in maritime law is imperative. Relinquishing the right to define the scope of federally established maritime remedies to the several states would be injurious to foreign and interstate commerce and lead to forum shopping.

This Court has repeatedly underscored the need for uniformity in maritime law. If the decision of the Fifth Circuit in this case is allowed to stand, there could be fifty different state rules on the recoverability of punitive damages in maritime matters.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be granted in this matter.

Respectfully submitted,

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